84-1684

No. ———

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ALLIED CORPORATION,

Petitioner,

v.

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY and JOSEPH MCCARDLE, on Behalf of Themselves and Others Similarly Situated,

and

THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

WILLIS J. GOLDSMITH
Counsel of Record
ERWIN N. GRISWOLD
DEBORAH CRANDALL

JONES, DAY, REAVIS & POGUE
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Attorneys for Petitioner

Of Counsel:

BRIAN D. FORROW
ROBERT H. SAND
Columbia Road & Park Avenue
Morristown, New Jersey 07960

Dated: April 26, 1985

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

1. In fashioning substantive federal labor law as required by this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), may a court base a remedy for breach of a collective bargaining agreement upon its prediction of what will be agreed to in labor negotiations for successor agreements—despite this Court's decisions in *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), and *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979), prohibiting such speculation?

2. In fashioning substantive federal labor law as required by this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), may a court base a remedy for breach of a collective bargaining agreement upon its prediction that employers will extend retiree insurance benefits beyond the expiration date of the collective bargaining agreement which created them—despite an explicit provision limiting such benefits to the term of the agreement?

3. In fashioning substantive federal labor law as required by this Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), may a court base a remedy for breach of a collective bargaining agreement upon its prediction that, in subsequent labor negotiations, employers will agree to bargain with a union about retiree insurance benefits, and agree to provide such benefits—despite this Court's decision in *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971), which held that employers are never required to bargain with a union about retiree insurance benefits?

PARTIES

The parties to the proceeding in the court below were: Allied Corporation ("Allied"), Armco, Inc. ("Armco"), Shannon Pocahontas Coal Company ("Shannon Pocahontas"), District 17, District 29, Local Union 7113, and Local Union 6023 of the United Mine Workers of America ("UMWA"), John Ramey and Joseph McCardle (on behalf of themselves and others similarly situated), and the United Mine Workers of America 1974 Benefit Plan and Trust ("1974 Benefit Trust"). This brief is filed on behalf of Allied. Allied has no parent company, no non-wholly-owned subsidiaries, and no affiliates.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. ———

ALLIED CORPORATION,

Petitioner,

v.

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY and JOSEPH MCCARDLE, on Behalf of Themselves and Others Similarly Situated,

and

THE UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Allied Corporation, an employer within the meaning of Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 ("Section 301"), prays that a writ of certiorari issue to review the 5-4 *en banc* decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The Fourth Circuit's 5-4 *en banc* opinion is as yet unreported. It is reproduced as Appendix A, *infra*, pp. 1a-20a. The *en banc* opinion reversed a 2-1 panel opinion, reported at 735 F.2d 121, and reproduced as Ap-

pendix B, *infra*, pp. 21a-52a. The memorandum opinion of the district court, which is unreported, is reproduced as Appendix C, *infra*, pp. 53a-68a. The judgment of the district court, also unreported, is reproduced as Appendix D, *infra*, pp. 69a-70a.

JURISDICTION

The final judgment of the court of appeals, reproduced as Appendix E, *infra*, p. 71a, was entered on February 11, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301(a) of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a).

STATEMENT

The Petitioner, Allied, owned and operated two coal mines in West Virginia whose employees were represented by the UMWA. Allied disposed of both mines in 1980, transferring the assets of one mine to Armco and the assets of the other mine to Shannon Pocahontas.

At the time of these sales, Allied was a member of the Bituminous Coal Operators' Association ("BCOA") and a party to the National Bituminous Coal Wage Agreement ("NBCWA") of 1978. This Agreement, a multi-employer collective bargaining agreement negotiated by

the BCOA and the UMWA, was in effect from March 27, 1978 through March 26, 1981. Article XX of the 1978 NBCWA provided as follows:

> [E]ach signatory Employer shall establish an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement as well as pensioners under the 1974 Pension Plan and Trust, whose last classified employment was with such Employer. The benefits provided pursuant to such plans shall be guaranteed *during the term of this Agreement* by each Employer at levels set forth in such plans.

(emphasis supplied). In accordance with this Article, Allied provided health insurance for its 1974 pensioners through March 26, 1981.

Having disposed of its last coal mines in 1980, Allied withdrew from the BCOA and did not become party to the 1981 NBCWA. Allied nevertheless continued to provide health benefits for its 1974 pensioners until August 1982. Given the terms of the 1978 NBCWA and various other documents, Allied then advised these individuals that it had no further obligation to provide insurance benefits for them and that their benefits were the responsibility of the 1974 Benefit Trust.[1] The 1974 Benefit Trust disclaimed any responsibility to provide the insurance benefits in question. This lawsuit ensued.

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[1] Prior to the 1978 NBCWA, the 1974 Benefit Trust provided the benefits in question. The BCOA and the UMWA switched to employer-provided health insurance under the 1978 NBCWA. The 1978 NBCWA stated that the 1974 Benefit Trust would continue to exist for the "sole purpose" of providing health benefits for 1974 pensioners whose last classified employment was with a signatory employer (including successors and assigns) that was no longer in business. At the commencement of this litigation, the Trust's assets of approximately $35 million produced income sufficient to cover more than twice its total expenditures.

Although the district court concluded that Article XX did not require Allied to provide insurance benefits for its 1974 pensioners after March 26, 1981, it nevertheless ordered Allied to "continue" to provide such benefits.[2] This Order was based upon Article I of the 1978 NBCWA, which provided as follows:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations *under this Agreement.*

(emphasis supplied). The district court found that Allied breached Article I by failing to secure the agreements of Armco and Shannon Pocahontas to assume Allied's obligation to provide insurance benefits for Allied's 1974 pensioners during the term of the 1978 NBCWA and "any subsequent renewals" of that Agreement.

This decision was reversed by a panel of the Fourth Circuit in a 2-1 opinion written by Judge Chapman. Citing *Hadley v. Baxendale,* 9 Exc. 339 (1854), the panel majority held the district court's remedy to be inappropriate even if Allied had breached Article I when it sold its coal mines. The panel said: "[b]ecause Article XX and Article I limit any rights and liabilities of the parties to the term of the contract, the parties could have reasonably foreseen that any damages would extend for the term of the contract, until March [26], 1981." App. B, *infra,* p. 33a. The court also noted that "the plain language of Article I of the 1978 Wage Agree-

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[2] The district court's jurisdiction was invoked pursuant to Section 502 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132, and Section 301. The complaint also included a pendent state law claim. Because of its decision with respect to the Section 301 claim, the court below did not address the ERISA claim or the pendent state law claim.

ment . . . refers only to 'Employer's Obligations Under This Agreement.' No mention is made of any subsequent agreement." App. B, *infra*, p. 35a.

The case was reheard *en banc* in October 1984. The 5-4 *en banc* decision affirms the judgment of the district court. It agrees with the panel majority that Article XX and Article I are limited to the term of the 1978 NBCWA. Thus, the majority found that Allied had breached Article I by failing "to require the purchaser[s] to assume the seller's obligations under the [1978] agreement." App. A, *infra*, p. 11a. However, the *en banc* majority departed from the panel majority and agreed with the district court that Allied's supposed breach of Article I justified an Order requiring Allied to "continue" to provide the insurance benefits beyond the presumed cutoff date of March 26, 1981, the expiration date of the 1978 NBCWA. App. A, *infra*, pp. 19a-20a. To reach this result, the *en banc* majority speculated that if Allied had complied with Article I at the time of the mine transfers, "the UMWA *would have insisted*" that Armco and Shannon Pocahontas bargain about Allied's 1974 pensioners during negotiations for the 1981 and 1984 NBCWAs. App. A, *infra*, p. 18a (emphasis supplied). Further speculating, the *en banc* majority concluded that "[i]f Allied had not breached the 1978 contract, the complaining retirees *very probably* would have been covered by Armco and Shannon Pocahontas until the expiration of the 1984 contract and thereafter as long as those corporations or their successors were in the business of mining coal and employing union coal miners." App. A, *infra*, p. 18a (emphasis supplied). On this basis, the court below affirmed the district court's injunction requiring Allied to "continue" to provide insurance benefits to its 1974 pensioners unless and until those obligations are assumed by Armco and Shannon Pocahontas. App. A, *infra*, pp. 19a-20a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Is In Conflict With *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), and *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212 (1979).

All the parties to this matter, and the court below, agree that Article XX of the 1978 NBCWA required Allied to provide the insurance benefits in question only until March 26, 1981. Indeed, the court below specifically stated that Allied's obligation to provide insurance benefits for its 1974 pensioners "existed only for the life of the contract, which expired in 1981." App. A, *infra*, p. 11a.

Nevertheless, the court below fashioned a remedy for Allied's supposed breach of Article I of the 1978 NBCWA that required Allied to "continue" to provide Article XX insurance benefits for its 1974 pensioners beyond the expiration date of the Agreement.[3] In so doing, the court simply rewrote the collective bargaining agreement thereby violating a basic precept of our federal labor law and policy. As this Court said in *H.K. Porter Co. v. NLRB*:

> One of these fundamental policies [of the National Labor Relations Act] is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the

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[3] Allied does not concede that it violated Article I. In fact, Allied complied with this provision by securing the agreements of Armco and Shannon Pocahontas to operate the transferred mines in accordance with the terms of the 1978 NBCWA. Moreover, even if Allied had breached Article I, this provision expressly states that an employer transferring a coal mine must pass on to its successor only "obligations under this Agreement." Those obligations were fully met by payments made directly by Allied.

> Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

397 U.S. at 108 (footnotes omitted). This principle has been affirmed repeatedly by this Court, most recently in *NLRB v. Bildisco and Bildisco*, 104 S. Ct. 1188, 1200 (1984). *See also* the decisions of the Fourth Circuit in *Clearwater Finishing Co. v. NLRB*, 670 F.2d 464, 468 (4th Cir. 1982), and *NLRB v. Atlantic International Corp.*, 664 F.2d 1231, 1233 (4th Cir. 1981) ("The notion that the Board may require a party to comply with what it speculates the outcome of negotiations would have been had good faith bargaining taken place clearly contravenes the holding of *H.K. Porter Co.*").

While *H.K. Porter* involved judicial review of the remedial authority of the NLRB, this authority, like that of the courts under Section 301, is predicated upon "the policy of our national labor laws." *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). It is well established that the courts, like the NLRB, are not free to impose or ignore contract terms. This was made abundantly clear by this Court in *Carbon Fuel Co. v. Mine Workers.*

The employer in *Carbon Fuel* was signatory to the 1968 and 1971 NBCWAs. It brought an action under Section 301 seeking, *inter alia*, to have a federal court imply a contractual obligation on the part of the UMWA. The Fourth Circuit refused to sanction judicial revision of the applicable collective bargaining agreements. Affirming the court of appeals, this Court observed:

> In the 1947 Taft-Hartley Act Congress sought to promote numerous policies. One policy of particular importance—if not the overriding one—was the policy of free collective bargaining. . . . And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree

> to a proposal, or even reach an agreement, Congress added § 8(d) defining "to bargain collectively" as "not [to] compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d). . . . *If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution.*

444 U.S. at 218-19 (emphasis supplied, citations omitted). This Court went on to note that "[i]t would do violence to the bargaining process and the national policy furthering free collective bargaining to impose by judicial implication a duty upon UMWA and District 17 that the parties in arm's-length bargaining first included and then purposely deleted." 444 U.S. at 221-22.

The court below has done no less violence "to the bargaining process and the national policy furthering free collective bargaining," than did the district court in *Carbon Fuel.* It has disregarded explicit contract language, *i.e.*, a clear, unambiguous provision limiting to "the term of this Agreement" an employer's obligation to provide certain benefits, and substituted its own idea of what the parties might or should have agreed upon.

The court below may have been motivated by a belief that the UMWA could not, or would not, have agreed to contract language in any way limiting an employer's obligation to provide retiree insurance benefits. But, in agreeing to Article XX, the UMWA did precisely that. The UMWA's assent to such a provision cannot be ignored or undone, as has been done by the court below, by overstating the differences between a collective bargaining agreement and an ordinary contract.

The risks inherent in such overstatement were well summarized by Justice Frankfurter in his dissent in *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960):

> There is no reason for jettisoning principles of fairness and justice that are as relevant to the law's

> attitude in the enforcement of collective bargaining agreements as they are to contracts dealing with other affairs, even giving due regard to the circumstances of industrial life and to the libretto that this furnishes in construing collective bargaining agreements.

Id. at 475-76. He then went on to quote Professor Archibald Cox, "[o]ne of the most experienced students of labor law . . . [on] the dangers of such an approach":

> The ease with which one can show that collective bargaining agreements have characteristics which preclude the application of some of the familiar principles of contracts and agency creates the danger that those who are knowledgeable about collective bargaining will demand that we discard all the precepts of contract law and create a new law of collective bargaining agreements. I have already expressed the view that the courts would ignore the plea but surely it is unwise even if they would sustain it. Cox, The Legal Nature of Collective Bargaining Agreements, in Collective Bargaining and the Law (Univ. of Mich. Law School), pp. 121-122.

Id. at 476. These observations of Justice Frankfurter and Professor Cox apply with particular force to this case. It was not the province of the court below to rewrite the contract made by the parties to rectify what it may deem to have been the UMWA's failings in collective bargaining.

B. The Decision Is In Conflict With *Allied Chemical & Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971).

The decision of the court below is based upon its view that if Armco and Shannon Pocahontas had assumed Allied's obligation to provide insurance benefits for Allied's 1974 pensioners until March 26, 1981, "the UMWA [then] would have insisted" (App. A, *infra*, p. 18a) that Armco and Shannon Pocahontas bargain about, and pro-

vide, insurance benefits for these individuals during the terms of the 1981 and 1984 NBCWAs. This is directly contradictory to the decision of this Court in *Pittsburgh Plate Glass.*

Pittsburgh Plate Glass makes it clear that an employer's duty to bargain under the National Labor Relations Act, 29 U.S.C. §§ 151, *et seq.*, does not extend to persons who, like Allied's 1974 pensioners, have already retired. They are not "and could not be 'employees' included in the bargaining unit" represented by any labor organization. 404 U.S. at 172. Nor is an employer, or a labor organization, required to bargain over retiree insurance benefits in future negotiations simply because it has done so in the past. *Id.* at 181-82.

Pittsburgh Plate Glass clearly limits the obligations of the parties to this case upon the expiration of the 1978 NBCWA in 1981. Thus, even if Allied had remained in the coal business with UMWA-represented employees in 1981 and 1984, it could have refused to bargain with the UMWA about insurance benefits for its 1974 pensioners for periods subsequent to March 26, 1981.[4] Moreover, Armco and Shannon Pocahontas had no duty to bargain with the UMWA about insurance benefits to be provided to their own 1974 pensioners after March 26, 1981, much less to Allied's 1974 pensioners.

Simply stated, in view of this Court's decision in *Pittsburgh Plate Glass*, the UMWA was in no position in 1981 or 1984 to "insist" that any employer bargain over insurance benefits for Allied's 1974 pensioners. This is so regardless of whether or not Allied failed to comply with Article I in 1980.

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[4] Of course, Allied had no obligation to become party to any "subsequent renewal" of the 1978 NBCWA or even to remain a member of the BCOA. *See* Charles D. Bonanno Linen Serv., Inc. v. NLRB, 454 U.S. 404 (1982).

II. THE COURT BELOW INCORRECTLY DECIDED AN IMPORTANT ISSUE OF FEDERAL LABOR LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court's decision in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), gives a federal court considerable flexibility to fashion a remedy for an employer's, or a union's, breach of a collective bargaining agreement. But there is no authority or rationale which permits a federal court, under the guise of fashioning a remedy pursuant to *Lincoln Mills*, to disregard the specific language of a collective bargaining agreement and, in addition, to speculate about the content of collective bargaining agreements that might be negotiated in the future between other parties.

As all parties to this matter and the court below agree, Article XX of the 1978 NBCWA is not susceptible to an interpretation that Allied's obligation to provide the insurance benefits in question survived the Agreement's expiration. The court below sought to avoid this fact by focusing instead upon Article I and speculating as to the results of future collective bargaining negotiations between the purchasers of Allied's coal mines and the UMWA.[5] It said:

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[5] The court below also relied upon three inapposite decisions of various courts of appeals. Those cases are Richardson v. Communications Workers, 443 F.2d 974 (8th Cir. 1971), *later app.*, 469 F.2d 333 (8th Cir. 1972), *cert. denied*, 414 U.S. 818 (1973), Thompson v. Bhd. of Sleeping Car Porters, 367 F.2d 489 (4th Cir. 1966), *cert. denied*, 386 U.S. 960 (1967), and Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962) (3-3 decision, *en banc*). *Richardson*, *Thompson*, and *Brooks Shoe* involved rights either not created by or not limited by a collective bargaining agreement. By contrast, the benefits at issue in this case find their origins in a collective bargaining agreement. Allied's 1974 pensioners were entitled to insurance benefits during the term of the 1978 NBCWA only because of Article XX of that NBCWA. Their entitlement to such benefits therefore is governed entirely by the terms of the contractual provision that created them.

> If Allied had not breached the 1978 contract, the complaining retirees *very probably* would have been covered by Armco and Shannon Pocahontas until the expiration of the 1984 contract and thereafter as long as those corporations or their successors were in the business of mining coal and employing union coal miners.

App. A, *infra*, p. 18a (emphasis supplied). This opinion is based upon the court's view that, if Armco and Shannon Pocahontas had assumed Allied's obligation to provide insurance benefits for Allied's 1974 pensioners during the remainder of the term of the 1978 NBCWA, they "probably" would have agreed in 1981 and 1984 to bargain about, and provide, additional insurance benefits for Allied's 1974 pensioners—individuals who have performed no services, ever, for either of these employers. Especially in light of this Court's decision in *Pittsburgh Plate Glass*, there is no legal or logical basis for this conclusion.

Lincoln Mills does afford the courts a measure of flexibility in devising remedies for breaches of collective bargaining agreements. However, this flexibility has limits established by this Court in scores of labor law decisions which have followed *Lincoln Mills*. These decisions establish certain guidelines to govern the world of industrial relations. Ironically, the court below has used *Lincoln Mills* to strip three of these decisions, *H.K. Porter*, *Carbon Fuel*, and *Pittsburgh Plate Glass*, of all meaning. Its decision is incorrect as a matter of federal labor law and should be reversed by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ALLIED CORPORATION

WILLIS J. GOLDSMITH
Counsel of Record

ERWIN N. GRISWOLD

DEBORAH CRANDALL
JONES, DAY, REAVIS & POGUE
665 15th Street, N.W.
Washington, D.C. 20005
(202) 879-3939
Attorneys for Petitioner

Of Counsel:

BRIAN D. FORROW
ROBERT H. SAND
Columbia Road & Park Avenue
Morristown, New Jersey 07960

Dated: April 26, 1985

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1117(L)

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY and JOSEPH MCCARDLE on behalf of themselves and others similarly situated,

Appellees,

versus

ALLIED CORPORATION,

Appellant,

and

ARMCO, INC.; SHANNON POCAHONTAS COAL CO., corporations; and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST

Defendants.

No. 83-1210

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; JOHN RAMEY and JOSEPH MCCARDLE on behalf of themselves and others similarly situated,

Appellee,

versus

ARMCO, INC.,

Appellant,

and

ALLIED CORPORATION, SHANNON POCAHONTAS COAL CO., corporations and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

No. 83-1211

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113 and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; JOHN RAMEY and JOSEPH MCCARDLE, on behalf of themselves and others similarly situated,

Appellees,

versus

SHANNON POCAHONTAS COAL CO.,

and

Appellant,

ALLIED CORPORATION, ARMCO, INC., corporations and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

No. 83-1212

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113 and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; JOHN RAMEY and JOSEPH MCCARDLE, on behalf of themselves and others similarly situated,

Appellants,

versus

ALLIED CORPORATION, ARMCO, INC., SHANNON POCAHONTAS COAL CO., corporations and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, Senior Judge. (C/A 82-2455).

Argued: October 2, 1984 Decided: February 11, 1985

Before WINTER, Chief Judge, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN, CHAPMAN and WILKINSON, Circuit Judges.

Willis J. Goldsmith (Deborah Crandall; Seyfarth, Shaw, Fairweather & Geraldson; Charles L. Woody, Spilman, Thomas, Battle and Klostermeyer; Paul M. Thompson, Gregory B. Robertson, Hunton and Williams on brief) for Appellants; Daniel B. Edelman (Yablonski, Both & Edelman; Michael H. Holland, Deborah Stern; Webster J. Arceneaux, III; Grant Crandall, Crandall, Pyles & Crandall on brief) and William F. Hanrahan, General Counsel (Mary Anne Gibbons, Associate Counsel on brief) for Appellees.

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* Judge Russell did not participate.

SPROUSE, Circuit Judge:

The defendants, Allied Corporation, Armco, Inc., and Shannon Pocahontas Coal Company appeal the district court's injunction requiring Allied to provide health and other non-pension benefits (benefits) to some 190 of its retired coal miners unless and until Allied can negotiate the provision of these benefits by Armco and Shannon Pocahontas, the corporations that acquired from Allied the coal mines that employed the miners prior to their retirement. The plaintiffs, District 17, District 29, Local Union 7113, and Local Union 6023 of the United Mine Workers of America (UMWA), and John Ramey and Joseph McCardle [1] appeal that part of the district court's judgment which found that the fourth defendant, the miners' 1974 Benefit Plan & Trust (1974 Benefit Trust), was not responsible for the payment of benefits to the retired miners.

A three-judge panel of this court, in a divided opinion reversing the district court, absolved Allied of any liability and held that the 1974 Benefit Trust was responsible for the payments to the retirees.[2] After an *en banc* hearing, we now affirm the district court's decision that Allied must provide the benefits to the retirees, and that the 1974 Benefit Trust is not responsible for such benefits.

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[1] John Ramey and Joseph McCardle represent a class of some 190 persons who retired from Allied during the period of the 1978 National Bituminous Coal Wage Agreement and received or still receive pensions from the 1974 Pension Plan and Trust. They also received benefits paid for by Allied pursuant to guidelines in the 1974 Benefit Plan and Trust and have been notified that their health benefits will no longer be paid for by Allied. This class also includes the spouses and dependents and surviving spouses and surviving dependents of these retired miners.

[2] *District 17, District 29, Local Union 7113 and Local Union 6023 v. Allied Corp.*, 735 F.2d 121 (4th Cir. 1984).

I.

The UMWA and many American coal mine owners have operated for many years under a master collective bargaining agreement such as the one involved in this dispute. The union and the Bituminous Coal Operators Association (BCOA) renegotiate it every three years. The three defendant corporate mine owners have been parties to several of these contracts; this suit focuses on obligations arising out of the 1978 agreement.

These collective bargaining agreements, for many years prior to 1974, have contained provisions for payment of benefits to active and retired miners.[3] The 1974 agreement created the 1974 Benefit Trust to provide such benefits to union miners receiving benefits under the 1974 pension plan or, in some cases, under any successor plans. The owners paid into the Trust a royalty on each ton of coal produced and on each hour's wage paid to a union employee. From this Trust the Trustees paid medical, hospitalization, and other expenses on behalf of retired miners.

A protracted strike occurred in 1977 when the 1974 agreement expired. BCOA's insistence that the 1974 Benefit Trust be abolished was a principal issue. The bargaining parties finally resolved that difference in 1978 by agreeing to an alternative: each signatory employer would provide, through its own insurance carrier, health and other non-pension benefits for its own union employees. They further agreed that the last signatory employer, or its successor, of a retired miner would provide the benefits to the retiree. Absent such employer or successor, the 1974 Benefit Trust would furnish the benefits.[4] The collective bargaining agreements of 1981 and

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[3] See *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982).

[4] Article XX, The National Bituminous Coal Wage Agreement of 1978.

1984 continued the 1974 Benefit Trust under essentially the same terms.

Until March 1980, Allied owned and operated, among its many corporate enterprises, the Harewood and Shannon Branch coal mines in West Virginia. It was a signatory to the 1978 collective bargaining agreement which was due to expire on March 27, 1981. In early 1980, however, it withdrew from the business of mining coal and sold both mines—its Harewood mine to Armco and its Shannon Branch mine to Vera Mining Company, now called Shannon Pocahontas.[5] Both purchasing companies, like Allied, were signatories to the 1978 agreement; [6] and both Armco and Shannon Pocahontas, in later years, signed the 1981 and 1984 collective bargaining agreements. Because Allied was no longer in the coal business, it was a party to neither the 1981 nor 1984 contracts.

The transfer agreements between Allied and Armco and Shannon Pocahontas provided that the corporate buyers would not assume any of Allied's obligations except those specifically provided for in those agreements.[7] Allied did not require Armco and Shannon Pocahontas to assume its obligations under Article XX of the 1978 con-

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[5] Vera Mining Company became a wholly-owned subsidiary of Royalty Smokeless Coal Company, which is a wholly-owned subsidiary of A.T. Massey Coal Company. Vera later changed its name to Shannon Pocahontas Coal Company.

[6] Prior to acquiring the Harewood mine, Armco signed the 1978 agreement. Vera/Shannon Pocahontas did not sign the 1978 agreement until after it acquired the Shannon Branch mine.

[7] Armco agreed, for example, to provide pension benefits, grant credit for length of service with Allied, continue pension coverage for those Allied workers who had obtained a vested interest in Allied's pension plans and, under certain conditions, to share responsibility with Allied for black lung claims. Shannon agreed, for example, to be responsible to Allied miners who accepted continued employment by Shannon Pocahontas for any claims under the workmen's compensation laws, federal, state and local laws regarding black lung disease, and hospital and medical care plans.

tract to provide benefits to the retired miners involved in the instant case. Instead, Allied continued to provide the benefits to the retirees for almost sixteen months after the execution of the 1981 collective bargaining contract by Armco, Shannon Pocahontas and other members of the BCOA, specifically until September 29, 1982.[8]

In August 1982 the retired miners requested from the Trustees of the 1974 Benefit Trust a determination as to whether they were eligible to receive health benefits from the Trust. The Trustees ruled that Article XX defined beneficiaries of the 1974 Benefit Trust as only those retirees whose last employer and its successor, if any, were no longer in business. Although the Trustees found that Allied was "no longer in business," they determined that Armco and Shannon were "successors" still in business. Therefore, the 1974 Benefit Trust could not pay benefits to the retired miners.

The parties contend below and on appeal as follows. Allied, Armco, and Shannon Pocahontas argue that Allied is not responsible for providing the benefits after the expiration of the 1978 agreement on March 27, 1981 and that neither Armco nor Shannon Pocahontas is responsible because each specifically contracted with Allied not to assume these obligations. All three companies urge that the 1974 Benefit Trust should pay the benefits directly to the retired miners who are parties to this action. The Trust, of course, denies liability and contends that Allied is responsible for the retirees' benefits. The union and the retirees contend that each of the companies is liable and, alternatively, that the 1974 Benefit Trust is liable.

The district court held that the 1974 Benefit Trust was not responsible but that the companies, under several theories, were responsible for payment of the benefits. The district court issued an injunction requiring Allied to provide the benefits unless and until Allied secures the

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[8] The 1981 contract was adopted on June 7, 1981.

agreement of Armco and Shannon Pocahontas to provide them. We first consider whether the Trustees of the 1974 Benefit Trust were wrong in refusing to provide benefits to the retired miners.

II

The 1974 Benefit Trust's purpose is to provide health and other non-pension benefits to pensioners who retired under the 1974 penson plan, or any successor plan, and whose last known employer, including any successor, is no longer in the coal-mining business. Article XX of the 1978 collective bargaining agreement provides in pertinent part:

> (c) (3) (iii) The 1974 Benefit Plan and Trust shall continue after May 31, 1978, for the sole purpose of providing health and other non-pension benefits, during the term of this Agreement, to any retired miner under the 1974 Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) from which he retired is no longer in business.

The 1974 Benefit Trust empowers the Trustees to interpret the provisions of the Trust.[9] Pursuant to that authority, the Trustees in July 1978, more than three years prior to this suit, defined the terms "no longer in business" and "successor"—definitions critical to the resolution of this dispute. Essentially, they ruled that a company is no "longer in business" when it "has not received income from the production or sale of coal, or transportation of coal, or related activities for at least six months."

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[9] Article III of the 1974 Benefit Trust Agreement provides that "the Trustees shall have full authority . . . with respect to administration of coverage and eligibility, methods of providing or arranging for provisions for benefits . . . and all other related matters."

In defining "successor," the Trustees stated that a successor exists for the purpose of deciding the 1974 Benefit Trust's liability if the purchaser (1) signs the 1978 collective bargaining agreement, (2) draws a majority of its employees from the seller, (3) operates at the same geographical location performing essentially the same job functions, (4) has not suspended its operations for more than six months, and (5) either acquires a substantial portion of the seller's assets or is owned and operated by the same persons controlling the seller.

In 1982 the Trustees, in denying benefits to the approximately 190 retirees involved in this appeal, found that Allied, although no longer in business itself because it had not received any income from coal for at least six months, sold its operations to firms meeting the successor criteria. The Trustees, in determining that Armco and Shannon Pocahontas are successors, found that the majority of the employees of Armco and Shannon Pocahontas were previously employed by Allied. Armco employed 159 former Allied workers in its 215-person work force, and Shannon Pocahontas employed 298 former Allied workers in its 401-person work force. The Trustees' opinion also explicitly stated that Allied "transferred most of the assets of its mines" to Armco and Shannon Pocahontas. Furthermore, the Trustees found that Armco and Shannon Pocahontas were signatories to the 1978 agreement and that there was no significant hiatus or change in the operation of the mines after the transfer. The Trustees, therefore, ruled that because Armco and Shannon Pocahontas are successors still mining at the locations purchased from Allied, the 1974 Benefit Trust agreement prevented the Trust from paying the retirees' benefits.

Trustees of a trust fund enjoy wide discretion in determining eligibility for benefits under their trust. In order to overturn this ruling of the Trustees, we must find that they acted arbitrarily or capriciously. *Maggard*

v. O'Connell, 671 F.2d 568, 570-71 (D.C. Cir. 1982); *Seafarers Pension Plan v. Sturgis*, 630 F.2d 218, 221 (4th Cir. 1980); *Pete v. UMWA Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975) (*en banc*); *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3d Cir. 1969); *KOLATA v. UMWA 1974 Pension Trust*, 533 F. Supp. 313, 318-19 (S.D. W. Va.), *aff'd*, 696 F.2d 990 (4th Cir. 1982); *Snyder v. Titus*, 513 F. Supp. 926, 932 (E.D. Va. 1981). Here, the instrument creating the Trust expressly empowered the Trustees to interpret it. They defined the critical terms used in Article XX in July 1978, long before this controversy arose. The Trustees meticulously followed the Trust's rules and procedures in defining terms and in deciding the retirees' eligibility for benefits, and its substantive conclusion concerning the successorship status of Armco and Shannon Pocahontas was reasonable. In these circumstances, the Trustees' denial of benefits was anything but arbitrary or capricious, and we affirm the district court's ruling to that effect. We now turn to the companies' contention that the district court erred in issuing the injunction requiring Allied to continue the benefit payments.

III

Under the 1978 agreement, coal mine operators, including Allied, agreed to provide health and other non-pension benefits to retired miners who last worked for signatory coal employers. Specifically, Article XX provided in pertinent part:

> (c) (3) (i) . . . each signatory Employer shall establish an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered by this Agreement as well as pensioners, under the 1974 Pension Plan and Trust, whose last classified employment was with such Employer. The benefits provided pursuant to such plans shall be guaranteed

> during the term of this Agreement by each Employer at levels set forth in such plans.

Although this obligation existed only for the life of the 1978 contract, which expired in 1981, it was perpetuated in the 1981 and 1984 contracts.

Superficially, it might appear that none of the defendants is liable for the retirees' benefits. Because Allied had withdrawn from the coal business in 1980 it was not a signatory to the 1981 and 1984 contracts. Armco and Shannon Pocahontas, on the other hand, although signatories to all three contracts, agreed with Allied when they individually acquired the two mines in 1980 that they would not assume the obligations to pay benefits to Allied's retirees. In creating the 1974 Benefit Trust, the union and the coal operators anticipated a successor scenario and agreed that, under such circumstances, the 1974 Benefit Trust could not assume responsibility for payment of the benefits.

If that were the complete picture, the answer to this dispute simply would be that after expiration of the 1978 agreement on March 27, 1981, no one had a duty to provide the retired miners with the disputed benefits. The agreement, however, also anticipated that operators might withdraw from the coal business and, by Article I, obligated the seller of a coal mine to require the purchaser to assume the seller's obligations under the agreement. Article I provides in pertinent part:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

It is clear that Allied breached Article I of the agreement when it agreed with Armco and Shannon Pocahontas

that the latter, as successors, would not assume Allied's obligations under the 1978 agreement. In the face of this obvious breach of contract, however, we confront the more difficult problems of identifying the damage to the retirees and considering an appropriate remedy. The companies argue that Allied was obligated to pay only until 1981 and in fact paid until 1982 and that, even if it had obtained the agreement of Armco and Shannon to assume its obligations to pay health benefits to retirees, those obligations would have expired in 1981. The companies further argue that as of the purchase date the renegotiation and continuation of the benefits in future contracts was speculative at best. These arguments overlook both the nature of the underlying principles of law and the nature of Allied's obligations under the 1978 contract.

While the companies acknowledge that a collective bargaining agreement is controlled by the "common law of collective bargaining," they argue only orthodox contract rules in advancing their view of the appropriate resolution of this dispute. They would have us go through the facile, but inutile, exercise of determining when Allied's obligations under the 1978 collective bargaining agreement expired rather than inquiring into the damages for Allied's breach while the contract was still operative.

In the first place, even under rules for interpreting ordinary commercial contracts we might well find that the damages to the retired miners were forseeable in 1980 after the contract was breached and that the remedy fashioned by the district court was appropriate to rectify the injury. It is not necessary, however, to resolve this principal issue in the context of rules of traditional contract law that do not control the relationship between these parties.

The Supreme Court long ago recognized that collective bargaining agreements were not to be interpreted under traditional rules of contract but under a federal common

law of collective bargaining. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). The Court held that collective bargaining agreements could not be pigeon-holed into a division of law that does not meet the interpretive necessities of labor agreements born of industrial relationships. In *Lincoln Mills*, the Court, in a historic decision recognizing that an agreement between parties to an industrial dispute is not an ordinary contract, said:

> The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy. Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.
>
> It is not uncommon for federal courts to fashion federal law where federal rights are concerned. Congress has indicated by § 301(a) the purpose to follow that course here.

Lincoln Mills, 353 U.S. at 456-57 (citations omitted).

In *United Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960), the Court elaborated on

the differences between collective bargaining agreements and ordinary contracts, differences which give rise to the former's special treatment under federal labor law.

> When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.

Id.; *see also Wiley & Sons v. Livingston*, 376 U.S. 543, 550-51 (1964).

Six years later, the Supreme Court, in *Transportation-Communication Employees Union v. Union Pacific Railroad Company*, 385 U.S. 157 (1966), provided further guidance for interpreting collective bargaining agreements. "In order to interpret such an agreeemnt it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Id.* at 159-61; *see also Kemmis v. McGoldrick*, 706 F.2d 993, 996 (9th Cir. 1983).

Federal appeals courts have, of course, uniformly followed the *Lincoln Mills* lead in dealing with contractual problems peculiar to industrial disputes. In *Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237 (7th Cir. 1982), the Seventh Circuit considered whether there had been an offer and acceptance of a collective bargaining agreement where there had been neither a written nor a spe-

cific oral acceptance. The Court found an agreement from the bargaining conduct of the parties, stating:

> Reasoned flexibility in the application of contract law to the field of labor relations is necessary to fully effectuate the policies underlying federal labor law. The Supreme Court has recognized that "a collective bargaining agreement is not an ordinary contract." In *Pepsi-Cola Bottling Co. v. N.L.R.B.*, the [Eighth Circuit] discussed why common law contract rules do not exclusively govern the collective bargaining setting.
>
> In contrast [to the rules of common law contract], the National Labor Relations Act compels the employer and the duly certified union to deal with each other and to bargain in good faith. Upon rejection of an offer, the offeror may not seek another contracting party.

Id. at 242 (citations omitted) (quoting *Pepsi Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89 (8th Cir. 1981)); *cf. Kemmis v. McGoldrick*, 706 F.2d 993 (usual principles of oral modification of a written contract do not necessarily apply to a collective bargaining agreement.)

Federal circuit courts likewise have applied the *Lincoln Mills* rationale in deciding issues of damages and remedies. In *Richardson v. Communications Workers of America*, 443 F.2d 974 (8th Cir. 1971), the Eighth Circuit in determining future damages for discrimination and wrongful discharge where the collective bargaining agreement expired six months after the plaintiff's discharge, stated:

> The expiration date of a bargaining contract does not place the employee in jeopardy of losing his job at the termination of the agreement. In fact one of the very incentives to union representation is job security. The employee, the union which represents him, the company which employs him, each contemplate a

> "subsisting" contractual relationship for an indefinite period of time. This is particularly true in established industries where continual dealings with a recognized union foster renewals and renegotiations. Furthermore, the employee, the union and the company are placed on notice that even after the bargaining agreement terminates the rights and obligations of the parties continue under the umbrage of the National Labor Relations Act. The obligation of the parties to bargain for new contracts is written into law. The company cannot exercise unilateral action detrimental to fair bargaining.
>
> In view of the character of work here involved, the time the plaintiff had been with the company, the strong likelihood of his future employment with the company, the probability of renewal of the collective bargaining agreement, the severance of seniority rights, we deem future damages extending beyond the date of any collective bargaining agreement recoverable under § 301. We thus conclude that it was error to limit plaintiff's damage by the expiration date of the collective bargaining agreement.

Id. at 978-80 (citations omitted); *see also Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489 (4th Cir. 1963) (seniority rights do not necessarily terminate at the expiration of the collective bargaining agreement; federal courts must fashion effective remedies for the impairment of federally created rights in the field of labor relations).

The Third Circuit has approved a similarly expansive approach to damages and remedies for breach of a collective bargaining agreement. In *Local 127, United Shoe Workers v. Brooks Shoe Manufacturing Company*, 298 F.2d 277 (3rd Cir. 1962) (en banc), the court awarded damages to a local union as a result of a company abandoning its contracts and relocating elsewhere. Despite the employer's argument that the union's damages for

loss of dues should be limited to the dues that would have been paid during the term of the contract that was breached, the court affirmed the district court's award of future damages calculated on the basis of contract renewals for twenty years. Relying on the above quoted language from *Lincoln Mills*, the plurality of the court stated:

> The bounds within which a federal court can travel in fashioning a remedy in an action under § 301(a) are far apart but well marked since the Supreme Court's decision in *Textile Workers Union of America v. Lincoln Mills.*
>
> . . . .
>
> . . . There is no basis in the record for concluding that repeated contracts would not have been successfully negotiated between the company and the union, and it has never been suggested that the union did not represent a majority of the employees, nor has an election ever been sought for selection of a new bargaining representative.

Id. at 281-82 (citations omitted).

We must examine whether the district court fashioned an appropriate remedy for Allied's breach of the 1978 agreement under this body of modern federal law, utilizing only those rules of traditional contract law that fit the mold prescribed by the Supreme Court and that "effectuate the policy which underlies federal labor legislation." *Seymour v. Hull & Moreland Engineering*, 605 F.2d 1105, 1109 (9th Cir. 1979).

Coal operators for many years have agreed to pay and have paid health benefits to miners. Prior to 1978, coal operators provided health benefits through an industry-wide trust fund. In a historic development in 1978, each company signatory to the 1978 collective bargaining contract agreed to provide benefits through its own insurance carrier, rather than through a trust fund. Vir-

tually the same agreement was executed in 1981 and 1984 during the periodic renegotiation of the expired contract. There is no evidence that Allied was acting in bad faith when it continued to pay the benefits after it left the coal business and until after the 1981 contract was negotiated. We attribute none.

Nonetheless, if Allied had complied with its contractual obligations and required Armco and Shannon Pocahontas to assume the disputed benefit obligations, it is obvious that the UMWA would have insisted that the latter two employers bargain concerning the continuation of this coverage in succeeding contract talks. In fact, the expected happened: both Armco and Shannon Pocahontas became signatories to the 1981 and 1984 contracts and thereby agreed to provide for retirees for whom they were responsible substantially the same health benefits as those agreed to in the 1978 contract. If Allied had not breached the 1978 contract, the complaining retirees very probably would have been covered by Armco and Shannon Pocahontas until the expiration of the 1984 contract and thereafter as long as those corporations or their successors were in the business of mining coal and employing union coal miners.

To be sure, it is not enough to rely on the actual developments in 1981 and 1984, and our decision is not premised on such hindsight. Allied's breach occurred in 1980 when it transferred the mines to Armco and Shannon Pocahontas without passing on all of its obligation as required by Article I of the 1978 collective bargaining agreement. Viewing its breach at that time, the consequences of the breach were easily foreseeable. Since at least 1950, in each bargaining year, the signatory employers renewed their agreement in one form or another. The insistence of the UMWA in bargaining for the continuation of the health and other non-pension benefits of retirees is written in the history of at least four contracts, including the one presently in effect. Loss of

benefits to the retired miners by Allied's actions was more certain than the loss of dues in *United Shoe* and the loss of earnings in *Richardson.* We must assume that Allied knew the consequences of selling its mines without requiring its successors to assume its obligations —namely, that its actions would leave the retirees without coverage and with no responsible employer against whom the UMWA could make contract demands at the next round of bargaining. Under these circumstances, a federal court appropriately may look to *Lincoln Mills* and *Warrior & Gulf*, as well as circuit court decisions such as *Richardson* and *United Shoe*, to determine an appropriate remedy.

The district court, in fashioning a remedy to effectuate the policies underlying the federal common law of collective bargaining, issued an injunction requiring Allied to continue to provide benefits to the retired miners until it secured agreements from Armco and Shannon Pocahontas to assume those obligations. The remedy fashioned by the district court here is in the same mold as that fashioned by the courts in *United Shoe* and *Richardson* and follows the dictates of *Lincoln Mills.* The district court found that Armco and Shannon also could be liable for the payments regardless of the disclaimer in their purchase agreements, reasoning that as signatories to the 1978 agreement, they also were bound by Article I's successor provision. We need not wander into that thicket or consider the effect of the "hold harmless" clauses in the transfer agreements. We review only the propriety of the district court's injunction and affirm that action. We note, moreover, that the damage consequential to Allied's breach can flow only as long as there is a successor coal mine employer in its chain of transfer who agrees to continue the coverage. Should those circumstances change, or should other circumstances change which might affect the parties' relationships, Allied may apply

to the district court for modification or dissolution of the injunction.[10]

In view of the above, it is not necessary to discuss the alternative reasons announced by the district court for issuing the injunction, namely: that Allied violated the requisite "care, skill, prudence and diligence" imposed upon it by the Employees Retirement Income Security Act, 29 U.S.C. § 1104(a)(1)(B), and that it was estopped from paying the benefits by its conduct in continuing to pay them beyond the expiration of the 1978 agreement.

The decision of the district court is

AFFIRMED.

CHAPMAN, Circuit Judge, dissenting:

I respectfully dissent for the reasons set forth in the majority opinion of the original three-judge panel in this case, which opinion is reported at 735 F.2d 121.

I am authorized to say that Judge Widener, Judge Phillips and Judge Wilkinson join in this opinion.

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[10] Although it is not necessary to now decide the question of the Trust Fund's responsibility for payment of the retiree benefits in the event circumstances should change so that neither Allied, Arinco nor Shannon Pocahontas would be responsible for maintaining the benefits, it seems clear that the Trust Fund in those circumstances would be responsible.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1117(L)

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY and JOSEPH MCCARDLE on behalf of themselves and others similarly situated,

Appellees,

vs.

ALLIED CORPORATION,

Appellant,

and

ARMCO, INC.; SHANNON POCAHONTAS COAL CO., corporations; and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

No. 83-1210

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; JOHN RAMEY and JOSEPH MCCARDLE on behalf of themselves and others similarly situated,

Appellees,

vs.

ARMCO, INC.,

Appellant,

and

ALLIED CORPORATION; SHANNON POCAHONTAS COAL CO., corporations and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

No. 83-1211

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113 and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; JOHN RAMEY and JOSEPH MCCARDLE, on behalf of themselves and others similarly situated,

Appellees,

vs.

SHANNON POCAHONTAS COAL CO.,

Appellant,

and

ALLIED CORPORATION, ARMCO, INC., corporations and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

No. 83-1212

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113 and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; JOHN RAMEY and JOSEPH MCCARDLE on behalf of themselves and others similarly situated,

Appellants,

vs.

ALLIED CORPORATION; SHANNON POCAHONTAS COAL CO., TAS COAL CO., corporations and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Appellees.

Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Dennis R. Knapp, District Judge. (C/A 82-2455)

Argued: October 5, 1983 Decided: May 8, 1984

Before SPROUSE and CHAPMAN, Circuit Judges and MERHIGE, District Judge.

Willis J. Goldsmith (Deborah Crandall; Seyfarth, Shaw, Fairweather & Geraldson; Charles L. Woody, Spilman, Thomas, Battle and Klostermeyer; Paul M. Thompson, Gregory B. Robertson, Hunton and Williams on brief) for Appellant; Webster J. Arceneaux, III (Grant Crandall, Crandall, Pyles & Crandall; Michael H. Holland, Deborah Stern; Daniel B. Edelman, Yablonski, Both & Edelman on brief) and William F. Hanrahan, General Counsel, UMWA Health and Retirement Funds (Mary Anne Gibbons, Associate Counsel on brief) for Appellees.

Honorable Robert R. Merhige, Jr., United States District Judge for the Eastern District of Virginia, sitting by designation.

CHAPMAN, Circuit Judge

Allied Corporation (formerly Allied Chemical Corporation), Armco, Inc. and Shannon Pocahontas Coal Company, Inc.[1] appeal the decision of the district court that Allied is obligated to provide health and non-pension benefits[2] to a class of some 190 of Allied's retired former employees unless and until Allied can negotiate with Armco and Shannon Pocahontas for the latter two companies to provide the benefits. In their amended complaint, plaintiffs[3] invoke the district court's jurisdiction under, *inter alia*, § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 and § 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132. The district court found that Allied, in transferring its coal mining assets to Armco and to Shannon Pocahontas, had breached Article I of the National Bituminous Coal Wage Agreement of 1978[4] (1978 Wage

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[1] The Shannon Branch mine was transferred from Allied to Vera Mining Company, a wholly owned subsidiary of Allied Corporation. Through a merger, Vera became a wholly owned subsidiary of Royalty Smokeless Coal Company, which is a subsidiary of A. T. Massey Coal Company. Vera subsequently changed its name to Shannon Pocahontas.

[2] Health and other non-pension benefits (referred to collectively as health benefits) included death benefits and medical insurance through Blue Cross/Blue Shield.

[3] Plaintiffs (also referred to collectively as District 17 or 1974 Pensioners) are two district and two local unions and a class consisting of some 190 persons who worked for Allied at two coal mines formerly owned by Allied. These persons retired during the period when the National Bituminous Coal Wage Agreement of 1978 was in effect and received benefits paid for by Allied pursuant to guidelines in the 1974 Benefit Plan and Trust and who have been notified that their health benefits would no longer be paid for by Allied. Class members also include spouses and dependents and surviving spouses and surviving dependents of class members who worked for Allied.

[4] The National Bituminous Coal Wage Agreement of 1978 is a collective bargaining agreement between the United Mine Workers

Agreement) by not obligating the transferee companies to assume responsibility for the health benefits of class members.[5] The court also found that Armco and Shannon Pocahontas had breached Article I by assuming Allied's coal operations without assuming Allied's obligations to its retired employees.

Allied provided health care coverage for plaintiffs throughout the term of the 1978 Wage Agreement, the last collective bargaining agreement to which it was a signatory. The clear language of the Wage Agreement required health benefit payments only during the term of the contract and not thereafter.[6] The district court was

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of America (UMWA) and the Bituminous Coal Operators' Association, Inc. (BCOA).

Article I of the 1978 Wage Agreement provided:

> This Agreement shall be binding upon all signatories hereto, including those Employers which are members of signatory associations, and their successors and assigns. In Consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successors to assume the Employer's obligations under this Agreement. Provided that the employer shall not be a guarantor or be liable for any breach by the successor or assignee of its obligations, and the UMWA will look exclusively to the successor or assignee for compliance with the terms of this agreement.

[5] In its conclusion of law Number Four, the court found that "Article I of the 1978 Wage Agreement prohibits a signatory employer from transferring a signatory coal operation to a successor or assign without securing the agreement of the successor or assign to assume the employer's obligations under the Wage Agreement and *any subsequent renewals of said Wage Agreement.*" (Emphasis added, not in district court's opinion).

[6] *See* Article I, *supra* fn. 4. Article XX(c)(3)(i) provided:

> [E]ach signatory Employer shall establish an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees cov-

clearly in error in extending Allied's obligation to pay for these benefits beyond the expiration date (March 26, 1981) of the 1978 contract. Allied is not a signatory to the 1981 National Bituminous Coal Wage Agreement.

We also find that plaintiffs did not prove the elements necessary to hold that Allied should be estopped from discontinuing the payments. Plaintiffs did not prove that Allied violated ERISA. We further find that the United Mine Workers of America 1974 Benefit Plan and Trust is responsible for the health benefits to the plaintiff class. Therefore, we reverse the decision of the district court.

I

The BCOA and the UMWA negotiate collective bargaining agreements every three years. Allied was a signatory to the 1978 Wage Agreement which was in effect from March 27, 1978 through March 26, 1981. The subsequent collective bargaining contract, the 1981 Wage Agreement, became effective on June 7, 1981. Armco and Shannon Pocahontas, but not Allied, were signatories to the 1981 contract.

The defendant 1974 Benefit Plan and Trust is an irrevocable trust created and perpetuated under the 1974, 1978 and 1981 National Bituminous Coal Wage Agreements. The trust resulted from labor negotiations between the UMWA and Bituminous Coal Operators Association. Under the Wage Agreements of 1974 and 1978 the coal mining companies made contributions to the 1974 trust of a certain dollar amount for each ton of coal mined and for each hour's pay to a union employee. The original purpose of the trust during the term of the 1974

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ered by this Agreement as well as pensioners under the 1974 Pension Plan and Trust, whose last classified employment was with such Employer. The benefits provided pursuant to such plans shall be guaranteed *during the terms of this Agreement* by each Employer at levels set forth in such plans. (Emphasis added.)

Wage Agreement was to provide health and other non-pension benefits for 1974 Pensioners and for union miners.

During the term of the 1978 Wage Agreement the 1974 Benefit Trust was to continue for the purpose of providing health benefits for 1974 Pensioners who were not eligible for such benefits from any employer. The 1981 Wage Agreement continued the arrangement for the 1974 Benefit Trust to protect 1974 pensioners not eligible for such benefits from any other employer. Under the 1981 Wage Agreement no contributions were required by the coal mining companies because at that time the corpus of the trust exceeded $37 million and the annual interest income greatly exceeded all claims and costs of administration.

Armco and Shannon Pocahontas did not agree to assume Allied's obligations for health benefits for class members when the Harewood mine was sold to Armco and the Shannon Branch mine was sold to Shannon Pocahontas. These sales took place while the 1978 Wage Agreement was in effect. After the transfers of the two mines, Allied continued to provide health benefit coverage for its formerly retired employees until September 1982. In July 1982 Allied advised the trustees of the 1974 Trust that, because the Wage Agreement of 1978 was no longer in effect, the corporation would terminate payment of Blue Cross-Blue Shield premiums as of September 1, 1982 for its retired former employees who had worked at the Harewood and Shannon Branch mines. Allied later advised its retirees that the 1974 Benefit Plan would be responsible for providing them with such health care benefits.

The argument that the 1974 Trust should provide health care coverage when other sources are not available is based on Article XX(c)(3)(iii) of the 1978 Wage Agreement which provides:

> The 1974 Benefit Plan and Trust shall continue after May 31, 1978, for the sole purpose of providing health and other non-pension benefits, during the term of this Agreement, to any retired miner under the 1974 Pension Plan or any successor plan(s) thereto who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns] from which he retired is no longer in business.

The Trustees of the 1974 Trust concluded that the trust was not responsible for the retirees' health care coverage because Armco and Shannon Pocahontas were Allied's "successors" and were not "no longer in business."

During the term of the 1978 Wage Agreement, various statements were made by employees of Allied that, plaintiffs contend, support the district court's finding that Allied should be estopped from discontinuing the payments.

In a letter of March 3, 1980, Ronald J. Russell, who was at that time Allied's manager for labor relations and equal employment opportunity, wrote to one of Allied's former employees at the Harewood mine: "This letter is being sent to you to advise you that your Health Benefits (Blue Cross/Blue Shield) are still the responsibility of Allied Chemical and not of Armco." Russell also stated in this letter that "Your coverage remains intact during the terms of the Contract."

In February 1980 Russell wrote to the UMW Fund stating:

> All employees and beneficiaries of employees who are Allied Chemical's responsibility regarding Health Benefits and Life Insurance coverage will be administered at the Corporation's Morristown New Jersey Headquarters. A listing of these employees is attached.

Another letter dated April 29, 1982, from Allied's pension services administration department addressed to

Blue Cross/Blue Shield included this statement: "As per the Labor Agreement in 1978, Allied Corporation (Semet-Solvay Division) being the last company signatory to a UMWA contract that employed Mr. Stewart, [one of the class members] is at present responsible for providing insurance coverage."

II

The district court found that Allied breached Article I of the 1978 Wage Agreement by not "securing the agreement of its successor[s] to assume Allied's health benefit obligations to its retired employees under the agreement" and directed as the remedy for this breach that Allied provide the benefits beginning some two years after the expiration of the collective bargaining agreement and extending indefinitely into the future unless Allied secures Armco's and Shannon Pocahontas' agreement to provide for these benefits.[7]

It is undisputed that Allied paid for all health benefits due under the 1978 Wage Agreement until long after it expired on March 26, 1981. Allied is no longer in the coal mining business and is not a signatory to the 1981 Wage Agreement.

The clear unambiguous language of Article XX—HEALTH AND RETIREMENT BENEFITS—1978 Wage Agreement reflect that these benefits and Allied's responsibility are for the term of the agreement only.

Article XX, Section (c) (3) (i) provides:

> (3) (i) Except as provided in (ii) below, effective on June 1, 1978, each signatory Employer shall establish an Employee benefit plan to provide, implemented through an insurance carrier(s), health and other non-pension benefits for its Employees covered

[7] The wage agreement expired in March 1981; the district court's order was dated January 12, 1983. The 1981 Wage Agreement will expire in March 1984 and a new agreement will be negotiated.

by this Agreement as well as pensioners, under the 1974 Pension Plan and Trust, whose last classified employment was with such Employer. The benefits provided pursuant to such plans shall be guaranteed during the term of this Agreement by each Employer at levels set forth in such plans.

The contributions by employers to the 1974 Benefit Plan are also limited to the term of the 1978 Wage Agreement. Article XX, Section (d) (i) (iv) and (d) (1) (v) (c) provide:

> (iv) Into the 1974 Benefit Trust: for the period beginning on March 27, 1978, and ending on April 26, 1978, 16.5 per hour on each such hour worked; for the period beginning on April 27, 1978, and ending when this Agreement is terminated, 2.0 per hour on each such hour worked. Any signatory Employer who does not elect to implement coverage through a private insurance carrier(s) on the effective date of the Agreement shall contribute for the period beginning March 27, 1978, and ending May 31, 1978, an additional 86.0 per hour on each such hour worked.
>
> (c) Into the 1974 Pension Trust: for the period beginning March 27, 1978, and ending March 26, 1979, 58.5¢ per ton on each such ton; for the period beginning March 27, 1979, and ending March 26, 1980, 59.0¢ per ton on each such ton; and for the period beginning March 27, 1980, and ending when this Agreement is terminated, 58.0¢ per ton on each such ton; . . .

The Wage Agreements are negotiated every three years and every benefit and every obligation is open for renegotiation.

The primary negotiators of Article XX for the BCOA and the UMW, respectively, testified in depositions that the health benefit provisions of each collective bargaining agreement are negotiated on a contract-by-contract basis.

The negotiator for the UMW was asked, "And you would be free to change, not only the benefits levels, as you earlier testified, but you would also be free to change the definition of 'going out of business' from contract to contract, or anything else for that matter, isn't that right?"

His reply was, "Everything is open for renegotiation at the end of the contract."

The chief negotiator for the BCOA answered similar questions:

Q. [By counsel] As far as you are concerned, are the parties free to change [health] benefit levels from contract to contract?

A. [By the BCOA negotiator] Are they free?

Q. Meaning the BCOA and the UMWA.

A. Yes, we negotiate on the basis of the term of the contract, and then a whole new ball game at the next negotiations.

* * *

Q. Would it be possible for the parties, meaning the BCOA and UMWA, to one day agree to provide no benefits for retirees . . .

A. For the UMWA and the BCOA?

Q. Yes.

A. I would think that is possible, yes.

There is no factual or legal basis for the district court's conclusion that obligations under the 1978 Wage Agreement extended past its expiration date. Employer obligations and employee rights, under a collective bargaining agreement, do not survive the expiration of the agreement absent a clear intention of the parties. *Local 1251 UAW v. Robertshaw Controls Co.*, 405 F.2d 29 (2nd Cir. 1968). The testimony of the contract negotiators clearly show that all rights and benefits were open for negotiation every three years.

Assuming that Allied breached the 1978 Agreement, have the plaintiff's proved any damages? We find plaintiffs have not shown that they have suffered a "legally cognizable loss as a result of the alleged breach." *Baltimore Regional Joint Board v. Webster Clothes, Inc.*, 596 F.2d 95, 98 (4th Cir. 1979). *Webster* and *Westinghouse Electric Corp. v. I.B.E.W.*, 561 F.2d 521 (4th Cir. 1977) *cert. denied*, 434 U.S. 1036 (1978), both hold that an arbitrator's award is not sustainable where the damages awarded exceeded any monetary loss caused by breach of the collective bargaining agreement. Although the instant case does not involve the review of an arbitrator's award, it involves the breach of a labor contract. The same issue was presented in *Webster* and *Westinghouse* and the reasoning of *Webster* and *Westinghouse* is persuasive. "It is clear that in order to be entitled to compensatory damages for contract breach, a party must have suffered some legally cognizable loss, be it manifestly monetary or measurable in monetary terms." *Webster*, 596 F.2d at 98.

The district court's authority to fashion a remedy is broad. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957). We accept this premise as well as plaintiff's contention that a collective bargaining agreement is not an ordinary contract. *Bowen v. United States Postal Service*, —— U.S. ——, 103 S.Ct. 588 (1983). Notwithstanding certain distinctions between a contract and a collective bargaining agreement, however, courts traditionally apply a contract analysis in determining the appropriate measure of damages for breach of a collective bargaining agreement.[8] *See, e.g., Webster, supra*;

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[8] Plaintiffs accept the well recognized contract analysis for determining the measure of damages in arguing that "[t]raditional principles of contract damages allow recovery for reasonably foreseeable consequences of a contract breach regardless whether such damages accrue immediately or sometime—even long—in the future."

Westinghouse, supra; *International Brotherhood of Electrical Workers Local 12 v. A-1 Electric Service, Inc.*, 535 F.2d 1 (10th Cir.), *cert. denied*, 429 U.S. 832 (1976); *Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3rd Cir. 1962).

In order for the remedy granted by the district court to be upheld, there must be evidence of reasonably foreseeable damages that were caused by the alleged breach and resulted in actual loss to the class members.

Plaintiffs contend that "[h]ad Allied required its purchasers to assume its obligations, its 1974 pensioners [class members] would have continuing coverage under the plans of its purchasers Armco and Shannon Pocahontas." This contention must be examined by applying the *Hadley v. Baxendale*, 9 Exc. 339 (1854) rule of foreseeability: that a defendant in a breach of contract action is liable for all damages resulting from the breach that could have been fairly and reasonably contemplated by the parties to the contract at the time of its execution. *Brooks Shoe, supra*, 298 F.2d at 281-282. Because Article XX and Article I limit any rights and liabilities of the parties to the term of the contract, the parties could have reasonably foreseen that any damages would extend for the term of the contract, until March 27, 1981.[9]

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[9] District 17 argues that by looking to the terms of the contract itself, defendants fail to distinguish between the duration and existence of contract rights and the rule for the measurement of contract damages, citing the union's argument in *Brooks Shoe, supra*, 298 F.2d at 280. In *Brooks Shoe* an equally divided court affirmed the district court's decision that a union could be awarded union dues for twenty years beyond the expiration date of a collective bargaining agreement where the employer breached a provision requiring the company "to continue to make the better grade shoes" at the plant represented by the union. 298 F.2d at 279. The conclusion that the district court was not clearly erroneous in finding that the company-union relationship would have continued for an additional twenty years was based on the long-standing

Plaintiffs' view of foreseeability requires us to find that, had Allied passed on its obligations under the 1978 Wage Agreement to Armco and to Shannon Pocahontas, the latter two companies would have then provided benefits to persons who had never worked for them under a new collective bargaining agreement and under all subsequent agreements. This conclusion requires too great a leap of logic and too all-encompassing a view of foreseeability for us to adopt. To achieve such a result Allied would have had to obligate its successors to engage in negotiations in 1981 and indeed to guarantee payment of the benefits under future contracts. This interpretation of foreseeability ignores contingencies that could have occurred such as strikes or negotiated terms providing

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existence and relationship of the employer and the union and employer's prospects of continuous operation. *Brooks Shoe* is distinguishable from the instant case because of the long-term nature of the promise to "continue to make the better grade shoes" and because the employer continued to manufacture shoes. In the instant case the parties agree that Allied is "no longer in the coal mining business."

The question of the relationship between the duration of a contract and the measure of damages was also at issue in *A-1 Electric Service, supra*. The court applied the foreseeability rule to a breach of a collective bargaining agreement and concluded, as we do, that the time period for measuring any damages should end with the expiration of the contract.

The court reasoned:

> A more reasonable cutoff date for the damages would be the end of the contractual year, in this case May 31, 1973. This is in accord with the general rule in breach of contract cases that the defendant is liable for all damages resulting from the breach that could have been reasonably and fairly contemplated by the parties at the time of execution. *United Shoe Workers, Local 127 v. Brooks Shoe Mfg. Co.*, ? Cir., 298 F.2d 277, 281-82; *Restatement of Contracts* § 330. It was foreseeable in the instant case that if the collective bargaining agreement were breached, that damages would accrue for at least the remainder of the contractual period.

535 F.2d at 4.

for a party other than the employer to assume responsibility for the payments. It also ignores the plain language of Article I of the 1978 Wage Agreement which refers only to "Employer's Obligations Under This Agreement." No mention is made of any subsequent agreement.

Nor has the key element of causation been shown. District 17 has not shown that, because Armco and Shannon Pocahontas were not obligated to assume health benefit obligations under the 1978 Agreement, the transferee companies did not undertake responsibility for the benefits under the 1981 Wage Agreement. If Armco and Shannon Pocahontas had assumed Allied's Article XX obligations, they, instead of Allied, would have been bound to provide health and other non-pension benefits for plaintiffs until March 27, 1981. Like Allied, they would have had no further obligations to those persons, unless and until there is a new contract so providing.

The 190 retirees have not shown that they suffered any actual loss as a result of Allied's not having transferred certain obligations to Shannon Pocahontas or to Armco. "A proper remedy in breach of contract suits is to place the plaintiffs in the position they would have attained had the contract been performed." *A-1 Electric Service, supra* at 3, *citing Interstate United Corp. v. White*, 388 F.2d 5, 7 (10th Cir. 1967). The contract was "performed" by Allied in that class members received their health benefits throughout the term of the 1978 contract. The question of obligations of companies other than Allied under subsequent contracts should have been determined when a new collective bargaining agreement was being negotiated. Under the terms of the 1978 Wage Agreement, plaintiffs had a promise from Allied to make the benefit payments for the term of the agreement. Allied fulfilled this commitment. Nowhere in the 1978 Wage agreement did Allied promise to accept responsibility for the benefit payments beyond the term of the contract. Nor did Allied agree in the 1978 Wage Agree-

ment to obligate companies who might acquire Allied's mines to assume responsibility for benefit payments under a collective bargaining agreement other than the 1978 Wage Agreement.

There is no finding by the district court or contention made that these health benefits are "vested." Pension rights are actuarially determined and are normally vested, but health and welfare benefits are negotiated periodically and last only the life of the collective bargaining agreement. *Turner v. Local Union No. 302*, 604 F.2d 7219 (9th Cir. 1979).

III

The district court held that "Allied is, at the very least, estopped from denying its responsibility for payment of the benefits by continuing to pay the same for some sixteen months beyond the expiration of the 1978 Wage Agreement under circumstances that clearly indicated Allied's intention to retain and continue the obligations imposed by the terms of ERISA and Article I of said 1978 Wage Agreement."

The leading West Virginia case of *Norfolk & Western Railway Co. v. Perdue*, 40 W.Va. 442, 21 S.E. 755 (1895), explains the elements necessary for invocation of the estoppel doctrine:

> The essential elements constituting the estoppel are . . . "(1) There must be conduct, acts, language or silence amounting to a representation or a concealment of material facts. (2) These facts must be known to the party estopped at the time of his said conduct, or at least the circumstances must be such that knowledge of them is necessarily imputed to him. (3) The truth concerning these facts must be unknown to the other party claiming the benefit of the estoppel at the time when such conduct was done, and at the time when it was acted upon by

> him. (4) The conduct must be done with the expectation that it will be acted upon by the other party, or under such circumstances that it is both natural and probable that it will be so acted upon . . . (5) The conduct must be relied upon by the other party, and, thus relying, he must be led to act upon it. (6) He must in fact act upon it in such a manner as to change his position for the worse. In other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct, and to assert rights inconsistent with it.

District 17 argues that the three statements made by employees of Allied and Allied's conduct in continuing to make payments for some sixteen months after the expiration of the 1978 Wage Agreement constitute a basis for estoppel. One of these statements, that "health benefits . . . are still the responsibility of Allied Chemical and not of Armco" was made in a March 1980 letter sent to Harewood mine retirees. This statement is not a misrepresentation. The letter states that Armco would not assume Allied's responsibility to provide health benefits for the retirees. No representation is made with respect to the duration of Allied's responsibility to make the payments. Nor does the statement of February 1980 include any expression of Allied's intent to continue benefit payments in the future. The April 1982 letter to Blue Cross/Blue Shield cannot form the basis for a finding of estoppel because it was not sent to any of the class members and there is no evidence that any of the retirees relied on the letter.

Finally, District 17 argues that because of Allied's conduct in continuing to make the payments, plaintiffs were lulled into false security and therefore did not bring suit to enjoin the transfers of the mines. At the time of the transfers, however, class members were told that Al-

lied and not the transferees would provide the benefits. District 17 is charged with knowledge of Article I and of the duration of the 1978 Wage Agreement. If plaintiffs relied on Allied's conduct or statements such reliance was not reasonable in light of plaintiffs' knowledge of the provisions of the 1978 Wage Agreement. Nor was such reliance detrimental since class members received the coverage for the term of the contract as well as for a period of time after the contract had expired.

IV

In finding an ERISA violation, the district court concluded that, by attempting to terminate the retirees' benefits in 1982, Allied "violated the requisite 'care, skill, prudence and diligence' imposed upon it by . . . 29 U.S.C. § 1104(a)" and failed "to discharge its duty 'in accordance with the documents and instruments 1978 Wage Agreement governing the plan' " as required by 29 U.S.C. § 1104(a)(1)(D). The pertinent provisions of 29 U.S.C. § 1104 are:

> (a)(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . .
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

29 U.S.C. § 1104.

It is unnecessary for us to decide the issues of whether Allied was a "fiduciary" or "administrator" under the statutory scheme. ERISA provides for specific remedies in the event of a breach by a fiduciary. 29 U.S.C. § 1109(a). The fiduciary may be held "personally liable to make good to such *plan* any losses to the *plan* result-

ing from each such breach," and may be required "to restore to such *plan* any profits . . . made through use of assets of the *plan*." (Emphasis added). The act also provides that the fiduciary "shall be subject to such other equitable or remedial relief as the court may deem appropriate."

The first two "remedies" are clearly inapplicable to the facts of this case. There were no losses to an employee benefit plan and no fiduciary profited through use of assets of the plan. With respect to other "appropriate remedies", this court's holding is that the remedy granted by the district court was not an appropriate one because Allied had fulfilled its commitment to provide health care coverage for the term of the 1978 Wage Agreement.

V

The district court found Armco and Shanon-Pocahontas had breached Article I of the 1978 Wage Agreement by purchasing mines from Aliled and not assuming Allied's obligations to the plaintiffs. The language of Article I is not susceptible to such construction. The clear language applies only to employers who sell, convey and transfer mines covered by the agreement. Buyers or purchasers of mines are no where mentioned. At the time of the transfer neither Shannon-Pocahontas nor its predecessors in name were signatories to the 1978 agreement. After acquiring the mine Shannon-Pocahontas did execute the agreement.

Armco was a signatory at the time of the transfer of the Allied mine, but it does not follow that Armco is prevented from buying from Allied if it suspected Allied might be in violation of Article 1 when such violation caused no loss or damage to anyone. The district court cites no statute, case or contract language to support this holding, which is clearly erroneous.

VII

The trustees of the 1974 Benefit Plan and Trust are trying to avoid the very purpose justifying their existence. The record clearly shows that this trust was created to provide for retired miners who become "orphans" by not being covered under some other plan. During negotiations preceding the 1978 Wage Agreement, BCOA tried to eliminate the 1974 Benefit Plan and Trust, but UMWA insisted that the 1978 Wage Agreement continue contributions to the 1974 plan to provide benefits to pensioners, who would otherwise lose benefits when benefits were changed from a multi-employer plan, covering all active and retired miners, to an individual company plan. As a result of collective bargaining the 1978 Wage Agreement provided for a continuation of payments by the employers into the 1974 plan for the purpose of providing for retired miners not covered by some other plan. This trust is the safety net intended to catch the plaintiffs, and it may not be removed by the trustees, now that it is needed.

The 1978 Wage Agreement provided:

> The 1974 Benefit Plan and Trust shall continue after May 31, 1978, for the sole purpose of providing health and other non-pension benefits, during the term of this Agreement, to any retired miner under the 1974 Pension Plan and Trust who would otherwise cease to receive the health and other non-pension benefits provided herein because the signatory Employer (including successors and assigns) from which he retired is no longer in business.

Article 11(f) of the 1974 Benefit Plan and Trust Agreement, as amended effective March 27, 1978, provided:

> Health and death benefits . . . shall . . . be provided [by the 1974 Benefit Trust] to any Pensioner who receives pension benefits under the 1974 Pen-

> sion Plan, . . . and who would otherwise cease to receive benefits because the signatory Employer (including successors and assigns) with whom such Pensioner last worked as a classified Employee is no longer in business, provided that (i) such Pensioner is not receiving a pension based in whole or in part on years of service credited under the terms of Article 11(G) of the 1974 Pension Plan, . . . or (ii) such Pensioner is not receiving a deferred vested pension based on less than 20 years of credited service. Notwithstanding the above, any Pensioner who was eligible for benefits under the 1974 Benefit Plan as a Pensioner on December 5, 1977, and who is not eligible for benefits under an individual employer benefit plan pursuant to Article XX, Section (c)(3) of the National Bituminous Coal Wage Agreement of 1978, shall be eligible for such benefits, subject to all other provisions of this plan. Health benefits shall not be provided for any month in which the Pensioner earns more than $200.

Findings of fact 14 and 15 of the district court explain the "Question and Answer" system used by the Trustees to interpret and administer the 1974 trust, as follows:

> 14. Pursuant to their authorization to administer the 1974 Trust, the Trustees adopted a "Question and Answer" (hereafter Q&A) system as a basis for establishing uniform rules of interpretation of the terms of the 1974 Trust to be used in deciding future questions of the 1974 Trust's responsibility. Pursuant to this system, the Trust's staff drafts questions and proposed answers for consideration by the Trustees. After its adoption by the Trustees, a Q&A is considered by the BCOA and the UMWA to be a final and binding interpretation of the terms of Article XX of the appropriate National Bituminous

Coal Wage Agreement and of the pertinent provisions of the 1974 Trust.

15. In July, 1978, the Trustees adopted definitions of the term "successor" and the phrase "no longer in business" to govern future questions about whether the 1974 Trust was responsible to provide benefits under Article II F of the 1974 Trust, as amended effective March 27, 1978. Those definitions, as set forth in Q&A H-16, are as follows:

Subject:

DEATH BENEFITS:

HEALTH BENEFITS: "Successor" and No Longer in Business"

Reference:

1974 Benefit Plan, as amended, Articles II F, G, and I: III B (1978)

Part I

Question: What is a "successor" company, signatory to the 1978 Wage Agreement, for purposes of health and death benefit obligations of the 1974 Benefit Plan and Trust?

Answer: 1. A company, itself signatory to the 1978 Wage Agreement, will be considered a "successor" if it expressly assumes health and death benefit obligations of retired persons last employed by the predecessor company by, for example, payment of health care bills or death benefits or execution of a contract with a health carrier providing coverage for such persons; or, if the signatory company implicitly assumes these obligations by, for example, oral promises of coverage or by other acts of similar implication.

2. Where no explicit or implicit assumption of obligations has occurred, a company signatory to the 1978 Wage Agreement will be considered a "successor" if:

(a) the new company has signed the 1978 Wage Agreement; *and*

(b) a majority of the employees presently working for the new employer formerly worked for the old employer; *and*

(c) the location is the same geographical area and the work functions have been continued relatively unchanged; *and*

(d) operations are not suspended for longer than six months (not counting a strike period); *and*

(e) either 1. there has been a transfer of a substantial proportion of the assets of the old company employer (seller) to the new company (purchaser),

or 2. the new company is owned and operated by substantially the same people who owned and operated the seller company

Part II

Question: When is a company "no longer in business" for purposes of health and death benefit obligations of the 1974 Benefit Trust?

Answer: A company is "no longer in business" when

1. the company claims that it is no longer in business by notifying the Funds in writing that the company is no longer in business and will not resume operations and thus requests that the Funds, in reliance upon the company's state-

ment, make payments to any appropriate beneficiaries eligible under provisions of the amended 1974 Benefit Plan and Trust; *and*

2. the company has not received income from the production or sale of coal, or transportation of coal, or related activities, for at least six months even if it retains a license to engage in coal mining or processing within the applicable state or states and retains an office.

A company may still be in business even if it satisfied #2 if circumstances clearly indicate that the company remains in business. For example, a company is still in business even if it has not mined coal for six months if the company is publicly seeking new employees or if the company indicates to its laid-off employees that it will re-employ them at an early future date.

The district court found that Allied had received no income from the production or sale of coal, or related activities, since it disposed of its mines in 1980 to Armco and Shannon Pocahontas. It is undisputed that Armco and Shannon Pocahontas in purchasing these mines assumed no obligation or liability with respect to any present or former Allied employee under any employee benefit plan.

The trustees found that Allied was "no longer in business" and that Allied's obligations to provide health benefits to its 1974 Pensioners ended on March 27, 1981, but the Trustees concluded that the 1974 Benefit Trust had no responsibility to Allied's 1974 Pensioners because Allied had "successors" which were not "no longer in business."

Since neither Armco nor Shannon Pocahontas assumed any obligation to Allied's 1974 Pensioners, they

or either of them could be Allied's "successors" under Question & Answer H-16 only if it

(a) signed the 1978 Wage Agreement.

(b) hired a majority of the employees of Allied.

(c) commenced operations in a location in the same geographical area and continued work functions relatively unchanged,

(d) did not suspend operations for more than six months, and either (1) acquired "a substantial portion of the assets" of Allied or (2) is owned and operated by the same people who owned and operated Allied.

The Trustees did not address the question of the proportion of Allied's assets acquired by Armco and Shannon Pocahontas, but it is admitted that Allied is a very large industrial complex still involved in many businesses and no longer involved in any phase of coal mining. There is no evidence that either of the purchasers hired a majority of Allied's employees or that the purchasers are owned and operated by the same people who owned and operated Allied.

Since Armco and Shannon Pocahontas do not qualify as "successors" under the Q&A H-16, and since Allied is "no longer in business" because it has so notified the Trustees, has received no income from the production or sale of coal or transportation of coal for at least six months and is not publically seeking new employees, nor has it indicated to laid off employees that they will be reemployed at an early date, the decision of the Trustees denying benefits to Allied's 1974 Pensioners is arbitrary and capricious. The district court's affirmation of this decision therefore cannot stand.

Decisions of the 1974 trustees are subject to review by appellate courts and must be supported by substantial evidence and are subject to examination under the arbitrary and capricious rule. *Maggard v. O'Connell,* 671

F.2d 568 (D.C. Cir. 1982). At page 571 the *Maggard* court states:

> In the case before us today, we think it would be quite dangerous "to slip into judicial inertia" given the "combination of danger signals" rebutting "the presumption of agency regularity." There have been a number of cases already holding the Funds' regulations and findings to be arbitrary and capricious. [footnote omitted] It should also be noted that what is being reviewed here is not the findings of an agency but rather the decision of private trustees based on evidence collected by a hearing officer employed by a private trust. A reviewing court should keep in mind that those close to the trust indeed have a *duty* to preserve the corpus of that trust and, accordingly, are naturally disinclined to make awards from it. It is also to be surmised that these individuals have no tenure, less job security, and are generally less well-insulated from outside pressures than those government employees whose decisions are more commonly reviewed under the "arbitrary and capricious" or "substantial evidence" standards.
>
> None of this is intended to disparage the performance of the trustees and their hearing officers. As we just stated, they might be remiss in their duties were they to be too generous with the funds entrusted to them. However, judicial review of their denial must be undertaken with similarly stern hand and flinty eye. Preservation of the corpus of the trust is the duty of the trustees, but not at the expense of the intended beneficiaries.

Maggard involved the trustees of the UMWA 1950 Trust and the omitted footnote lists seven reported cases and two unreported cases involving arbitrary and capricious actions of the trustees. Although the trustees of the 1950 Trust are not the same as the trustees of the

1974 Benefit Plan, the language in *Maggard* is instructive and indicative of the efforts of private trustees of the coal miners' trusts to be overly protective of the corpus at the expense of the intended beneficiaries.

The court's conclusion that Armco and Shannon Pocahontas are "successors" to Allied cannot stand examination under *Howard Johnson Company v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees Union*, 417 U.S. 249 (1974). Howard Johnson bought the hotel and restaurant business of P. L. Grissom and Son. Grissom's employees were represented by a union, and its collective bargaining contract stipulated that the contract was binding on "successors". The contract between Howard Johnson and Grissom provided that Howard Johnson would not recognize or assume any labor agreements or obligations and liabilities thereunder. The union brought an action against Howard Johnson to compel arbitration under the predecessors' collective bargaining agreement, but the Supreme Court held that the mere existence of a successor clause in a bargaining agreement did not bind Howard Johnson when it was perfectly clear that Howard Johnson refused to assume any obligations under the agreement.

Armco and Shannon Pocahontas refused to assume any obligations to Allied employees under the purchase instrument signed with Allied, and they do not qualify as "successors" under the Q&A H-16 definition.

The retired miner plaintiffs are the intended beneficiaries of the 1974 Benefit Plan and Trust and are entitled to the health and non-pension benefits provided thereunder.

REVERSED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent.

The majority opinion is well-written and ultimately achieves a humane result, but I believe it places the financial burden for the retirees' benefits on the wrong party. Allied, not the UMWA Benefit Trust Fund (Fund), should be assessed the costs of these pensioners health and insurance benefits, for its breach of the 1978 Wage Agreement and ERISA caused the threatened cut-off.

The Fund's principal purpose is to provide health and insurance coverage to 1974 UMWA pensioners whose last known employer is no longer in the coal-mining business. An employer no longer engages in coal-mining for the purposes of assigning liability to the Fund when it and its *successors* cease the sale, production or transportation of coal. *Benefit Trust Agreement*, Question and Answer, H-16. The Fund, in denying benefits to the nearly 200 pensioners involved in this appeal, found that Allied, though no longer in business itself, sold its operations to firms meeting the successor criteria. It ruled that, since these successors were still mining at the locations purchased from Allied, the Fund's regulations prevented it from picking up the cost of the pensioners' benefits.

The majority reverses this decision because it believes the Fund acted arbitrarily in denying benefits. *See, e.g., Maggard v. O'Connell*, 671 F.2d at 571. I cannot agree. A successor exists for the purpose of deciding the Fund's liability if the purchaser (1) signs the 1978 NBCWA, (2) draws a majority of its employees from the seller, in this case Allied, (3) operates at the same geographical location performing essentially the same job functions, (4) has not suspended its operations for more than six months, and (5) either acquires a substantial portion of the seller's assets or is owned and operated by the same

people controlling the seller. The majority concedes that criteria (1), (3), and (4) have been met, but curiously finds no evidence that the successors drew a majority of their employees from Allied (2) or acquired a substantial portion of its assets (5).

The record and a fair reading of the Fund's regulations, however, dispute the majority's interpretation of the available evidence. The Fund, in reaching its decision on the retirees' benefit applications, stated that Armco employed 159 former Allied workers in its 215 person work force, while Shannon employed 298 former Allied workers in its 401 person work force. None of the parties in this litigation have disputed these figures, yet the majority inexplicably ignores this information in placing liability on the Fund.

The majority further concludes that "[t]he Trustees did not address the question of the proportion of Allied's assets acquired by Armco and Shannon". This conclusion is simply wrong. The Fund's opinion explicitly states that Allied "transferred most of the assets of its mines" to Armco and Shannon Pocahontas, a finding confirmed by Allied officials in testimony before the district court. I can only surmise that the majority overlooks this evidence it believes that Allied's total corporate assets, even those unrelated to coal mining, must be considered in determining whether it has sold a substantial part of its operations to a successor. The illogic of this position becomes evident, however, when one realizes that such a construction of the Fund's criteria would virtually preclude large, diversified companies from ever having a smaller successor—an advantage I seriously doubt the drafters of the 1978 Wage Agreement intended to confer.

The Fund meticulously followed its rules and procedures in deciding the pensioners eligibility for benefits, and its substantive conclusion concerning the successorship status of Armco and Shannon Pocahontas was unassail-

able. In these circumstances, the Fund's denial of benefits was anything but arbitrary and capricious. *Maggard v. O'Connell*, 671 F.2d at 570-571, *See also UMWA v. Robinson*, 455 U.S. 562 (1982).

The majority's error in placing liability on the Fund does not mean that the retirees should be denied continued benefits or even that the responsibility should be shifted to the successor companies, Armco and Shannon. *Cf. Howard Johnson Co. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees' Union*, 417 U.S. 249 (1974). In my mind, the threat to the pensioners' benefits flows directly from Allied's breach of the 1978 Wage Agreement and ERISA and consequently continued responsibility rests with it.

In Article I of the 1978 Wage Agreement, Allied agreed that its [coal-mining] operations . . . [would] not be sold, conveyed, or otherwise transferred . . .to any successor without first securing the agreement of the successor to assume [Allied's] obligations under this [contract]." It breached this agreement by selling its Harewood and McDowell County coal operations without passing along its pensioner obligations to the successors. The majority is not disturbed by this breach because Allied provided a form of alternative performance that guaranteed the pensioners' benefits for the life of the 1978 contract. Article I of the 1978 Wage Agreement, however, guaranteed pensioners more than the right to benefits for the life of the contract; it provided an assurance that their interests would be fully protected if the health plans were later renewed in the 1981 National Bituminous Coal Wage Agreement. The right guaranteed through this assurance was contingent, but it is obvious value to the pensioners as demonstrated by the present controversy. Had Allied abided by the terms of Article I, Armco and Shannon would have entered the 1981 negotiations as the

last responsible employers of the retirees. As such, they would have been obligated to negotiate with the union concerning the continual funding of the 1974 Benefit Fund. The companies may have succeeded in bargaining away these obligations or modifying the benefit arrangements, but the pensioners' rights would have been finally decided by the same process that created them, collective bargaining. Allied's breach short-circuited this process and removed the pensioners' benefits from consideration at the bargaining table. The resulting threat to the pensioners continued benefits was a natural and foreseeable consequence of Allied's self-serving unilateral action, and thus was remediable under the *Hadley v. Baxendale* rationale.

Finally, I believe the majority is mistaken when it concludes that the remedy ordered by the district court was not appropriate under ERISA. Section 1109 of the Act provides that "[a]ny person . . . who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries . . . shall be subject to such other *equitable or remedial relief as the court may deem appropriate.*" (emphasis added). The senate committee reports discussing this provision emphasize that Congress intended to give courts broad discretion in fashioning a remedy that best carries out the purposes of the Act and is most advantageous to the participants and beneficiaries of the involved health and insurance plan. S. Rep. No. 93-127, 93d Cong., 1st Sess., *reprinted in*, 1974 U.S. Code Cong. & Admin. News 4838, 4871. *See also Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978); *Freund v. Marshall Ilsley Band*, 485 F. Supp. 629, 643 (W.D. Wis. 1979). These reports further emphasize that federal courts are to draw on principles of traditional trust law "in using [their] equitable and remedial powers to rectify ERISA violations" *Eaves v. Penn*, 587 F.2d at 462.

One of the remedies traditionally available to beneficiaries injured by a breach of trust is to be restored "to the position they would have occupied but for the breach." *Eaves*, 587 LF.2d at 462. The district court, in the present case, attempted to accomplish just that by ordering Allied to continue paying the costs of the pensioners' benefit package. Its decision furthered ERISA's expressed goal of safeguarding worker benefits and was consistent with the broad remedial powers Congress granted to the courts. Accordingly, I would affirm the district court's judgment.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 82-2455

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY, JOSEPH MCCARDLE, and GROVER C. ROBINSON, on behalf of themselves and others similarly situated,

Plaintiffs,

Vs.

ALLIED CORPORATION, ARMCO, INC., SHANNON POCAHONTAS COAL CO., corporations; and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

MEMORANDUM OPINION

This action was brought by plaintiffs as a class action on behalf of a class defined by stipulation of the parties hereto as "those persons who retired from Allied Corporation and who now receive pensions from United Mine Workers of America 1974 Benefit Plan and Trust, as well as those spouses and dependents of such persons and surviving spouses and surviving dependents of those persons who retired from Allied and who once received pensions from the Pension Trust for whom Allied Corporation was providing health and non-pension benefits as of September 29, 1982." The Court finds that the class, as defined, is so numerous that joinder of all class members is impracticable; that the claims of the plaintiffs, John Ramey, Joseph McCardle and Grover C. Robinson, are typical of the claims of the class members; that these named plaintiffs fairly and adequately protect the interests of the class; and that there are questions of law and fact common to the class which predominate

over any questions affecting individual members only. The Court further finds that each defendant has acted or failed to act, in concert or individually, on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.

Therefore, for the above-stated reasons, it is hereby ORDERED that plaintiffs be permitted to proceed as a class, as above defined.

It is further ORDERED that the Motion of the Trustees of the United Mine Workers of America 1974 Benefit Plan and Trust (hereafter 1974 Trust) to intervene as defendants be granted.

After careful consideration of the stipulations of the parties, the evidence before the Court, and the argument of counsel for the respective parties, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Plaintiffs, District 17, District 29, Local Union 7113 and Local Union 6023, United Mine Workers of America (hereafter UMWA) are labor organizations within the meaning of Section 2(5) of the Labor Management Relations Act (hereafter LMRA). 29 U.S.C. § 152(5). Plaintiffs, District 17 and Local Union 7113, represent retired employees of defendant, Allied Corporation (hereafter Allied), and active and retired employees of defendant, Armco, Inc. (hereafter Armco). Plaintiffs, District 29 and Local Union 6023, represent retired employees of defendant, Allied, and active and retired employees of defendant, Shannon Pocahontas Coal Co., Inc. (hereafter Shannon Pocahontas). The offices of District 17 and Local Union 7113 are located in Kanawha County, West Virginia; the office of District 29 is located in Raleigh County, West Virginia; and the office of Local Union 6023 is located in McDowell County, West Virginia.

2. Plaintiff, John Ramey, who resides in Hugheston, West Virginia, retired from Allied's Harewood, West Virginia coal mine on or about September 1, 1979, and receives a pension from the 1974 Trust.

3. Plaintiff, Joseph McCardle, who resides in Powellton, West Virginia, retired from Allied's Harewood, West Virginia coal mine prior to December 1, 1979, and receives a pension from the 1974 Trust.

4. Plaintiff, Grover C. Robinson, who resides in Kegley, West Virginia, retired from Allied's Shannon Branch mine near Capels, West Virginia, on or about April 30, 1978, and receives a pension from the 1974 Trust.

5. Defendant, Allied, formerly Allied Chemical Corporation, is incorporated under the laws of the State of New York and has its principal office in Morristown, New Jersey. Allied is an employer engaged in commerce and employs persons in industries affecting commerce within the meaning of Sections 2(2) and 2(7) of the LMRA, as amended. 29 U.S.C. §§ 152(2) and 152(7). Allied was signatory to the National Bituminous Coal Wage Agreement of 1978 (hereafter 1978 Wage Agreement) but was not signatory to the National Bituminous Coal Wage Agreement of 1981 (hereafter 1981 Wage Agreement).

6. Defendant, Armco, is incorporated under the laws of the State of Ohio, is an employer engaged in commerce, and employs persons in industries affecting commerce within the meaning of Sections 2(2) and 2(7) of the LMRA. 29 U.S.C. §§ 152(2) and 152(7). Armco was signatory to the 1978 Wage Agreement and is signatory to the 1981 Wage Agreement.

7. Defendant, Shannon Pocahontas, is incorporated under the laws of the State of West Virginia, is an employer engaged in commerce, and employs persons in industries affecting commerce within the meaning of Sec-

tions 2(2) and 2(7) of the LMRA. 29 U.S.C. §§ 152(2) and 157(7). Shannon Pocahontas was signatory to the 1978 Wage Agreement and is signatory to the 1981 Wage Agreement.

8. Defendant, 1974 Trust, is an irrevocable trust created and perpetuated pursuant to the 1974, 1978 and 1981 wage agreements, the LMRA of 1974, 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001, et seq. The 1974 Trust was established by collective bargaining between the UMWA and Bituminous Coal Operators Association, Inc. (hereafter BCOA), on December 6, 1974, and has been amended by the parties thereto in subsequent agreements on March 27, 1978, and June 7, 1981. The 1974 Trust is incorporated by reference into the wage agreements of 1974, 1978 and 1981.

9. Defendants, Harrison Combs, John J. O'Connell and Paul R. Dean, are trustees of the 1974 Trust. Mr. Combs is a citizen of Maryland; Mr. O'Connell is a citizen of Pennsylvania; and Mr. Dean is a citizen of Virginia.

10. The 1974, 1978 and 1981 wage agreements are collective bargaining agreements between the UMWA and the BCOA. The 1974 Wage Agreement was in effect from December 6, 1974 through December 6, 1977. The 1978 Wage Agreement was in effect from March 27, 1978 through March 26, 1981, and the 1981 Wage Agreement, adopted on June 7, 1981, is still in effect.

11. Article I of the 1978 Wage Agreement provides in pertinent part:

> In consideration of the Union's execution of this Agreement, each Employer promises that its operations covered by this Agreement shall not be sold, conveyed, or otherwise transferred or assigned to any successor without first securing the agreement of the successor to assume the Employer's obligations under this Agreement.

12. Article XX(c)(3)(i) of the 1978 Wage Agreement provides that:

> The benefits provided pursuant to [an employee benefit plan implemented through an insurance carrier] . . . shall be guaranteed during the term of this Agreement by each Employer at levels set forth in such plans.

Article XX(h) of the 1978 Wage Agreement provides:

> Section (h) Guarantee of 1950 Plans and Trusts and 1974 Plans and Trusts
>
> Notwithstanding any other provisions in this Agreement the Employers hereby agree to fully guarantee the pension and health benefits provided by the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement.
>
> In order to fully fund these guaranteed benefits the BCOA may increase, not decrease, the rate of contributions to be made to the 1950 Pension Fund, the 1950 Benefit Fund, the 1974 Pension Fund, the 1974 Benefit Fund and all other benefit plans described in Section (c) of this Article XX during the term of this Agreement. These contributions, which may be adjusted from time to time, shall be made by all Employers signatory hereto during the term of this Agreement.

Article XX states that "[h]ealth benefits are . . . guaranteed during the term of this Agreement . . . at the level of benefits provided in the prior Agreement. . . ."

13. 29 U.S.C. § 1104(a)(1), at its pertinent parts, provides as follows:

> . . . a *fiduciary* shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) For the exclusive purpose of: (i) providing benefits to participants and their beneficiaries

(B) With the *care, skill, prudence* and *diligence* under the circumstances then prevailing that a prudent man acting in like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

* * * *

(D) *in accordance with the documents and instruments governing the plan* insofar as such documents and instruments are consistent with the provisions of this subchapter. (Emphasis added).

14. Pursuant to their authorization to administer the 1974 Trust, the Trustees adopted a "Question and Answer" (hereafter Q&A) system as a basis for establishing uniform rules of interpretation of the terms of the 1974 Trust to be used in deciding future questions of the 1974 Trust's responsibility. Pursuant to this system, the Trust's staff drafts questions and proposed answers for consideration by the Trustees. After its adoption by the Trustees, a Q&A is considered by the BCOA and the UMWA to be a final and binding interpretation of the terms of Article XX of the appropriate National Bituminous Coal Wage Agreement and of the pertinent provisions of the 1974 Trust.

15. In July, 1978, the Trustees adopted definitions of the term "successor" and the phrase "no longer in business" to govern future questions about whether the 1974 Trust was responsible to provide benefits under Article II F of the 1974 Trust, as amended effective March 27, 1978. Those definitions, as set forth in Q&A H-16, are as follows:

Subject:

DEATH BENEFITS:

HEALTH BENEFITS: "Successor" and "No Longer in Business"

Reference:

1974 Benefit Plan, as amended, Articles II F, G, and I: III B (1978)

Part I

Question: What is a "successor" company, signatory to the 1978 Wage Agreement, for purposes of health and death benefit obligations of the 1974 Benefit Plan and Trust?

Answer: 1. A company, itself signatory to the 1978 Wage Agreement, will be considered a "successor" if it expressly assumes health and death benefit obligations of retired persons last employed by the predecessor company by, for example, payment of health care bills or death benefits or execution of a contract with a health carrier providing coverage for such persons; *or*, if the signatory company implicitly assumes these obligations by, for example, oral promises of coverage or by other acts of similar implication.

2. Where no explicit or implicit assumption of obligations has occurred, a company signatory to the 1978 Wage Agreement will be considered a "successor" if:

(a) the new company has signed the 1978 Wage Agreement; *and*

(b) a majority of the employees presently working for the new employer formerly worked for the old employer; *and*

(c) the location is the same geographical area and the work functions have been continued relatively unchanged; *and*

(d) operations are not suspended for longer than six months (not counting a strike period); *and*

(e) either 1. There has been a transfer of a substantial proportion of the assets of the old company employer (seller) to the new company (purchaser),

or 2. the new company is owned and operated by substantially the same people who owned and operated the seller company.

Part II

Question: When is a company "no longer in business" for purposes of health and death benefit obligations of the 1974 Benefit Trust?

Answer: A company is "no longer in business" when

1. the company claims that it is no longer in business by notfying the Funds in writing that the company is no longer in business and will not resume operations and thus requests that the Funds, in reliance upon the company's statement, make payments to any appropriate beneficiaries eligible under provisions of the amended 1974 Benefit Plan and Trust; *and*

2. the company has not received income from the production or sale of coal, or transportation of coal, or related ac-

> tivities, for at least six months even if it retains a license to engage in coal mining or processing within the applicable state or states and retains an office.
>
> A company may still be in business even if it satisfied #2 if circumstances clearly indicate that the company remains in business. For example, a company is still in business even if it has not mined coal for six months if the company is publicly seeking new employees or if the company indicates to its laid-off employees that it will re-employ them at an early future date.

16. From approximately 1938 until March, 1980, Allied was engaged in coal mining operations in Kanawha and Fayette counties near Harewood, West Virginia, and in McDowell County near Capels, West Virginia.

17. Pursuant to an agreement to settle a lawsuit in which Allied had been found liable to Armco, Allied transferred its Harewood coal mining operations to Armco on or about January 19, 1980. Allied transferred a substantai portion of the Harewood assets to Armco, and the majority of Armco's employees at Harewood were previously employed by Allied at Harewood. Armco began operating the Harewood mine without any substantial change in Allied's operations.

18. On February 27, 1980, pursuant to an agreement of reorganization, Allied transferred the assets of its Shannon Branch mine to Vera Mining Company (hereafter Vera), which became a wholly-owned subsidiary of Royalty Smokeless Coal Company, which is a wholly-owned subsidiary of A. T. Massey Coal Company. Vera later changed its name to Shannon Pochontas Coal Company, Inc. Allied transferred a substantial portion of the Shannon Branch mine assets to Vera, and the ma-

jority of Vera's employees at Shannon Branch were previously employed by Allied at Shannon Branch. Vera began operating the Shannon Branch mine without any substantial change in Allied's operations.

19. Allied has received no income from the production or sale of coal, or related activities, since it transferred the Harewood and Shannon Branch mines.

20. 2.07 of the Reorganization Agreement between Allied and Vera provides:

> 2.07 Except to the extent expressly set forth herein or in any document delivered pursuant hereto, neither any Massey Company nor Vera shall be or become responsible for any obligations or liabilities of Allied, fixed or contingent (herein collectively referred to as "Retained Liabilities"), and Allied shall, up to and following the Closings, indemnify and hold harmless each Massey Company and (following the Second Closing) Vera from claims, losses, damages, and expenses, including reasonable attorneys' fees, resulting from such Retained Liabilities.

The Settlement Agreement between Armco and Allied provides:

> 4.2. Armco shall neither have nor assume any obligation or liability with respect to any Allied Employee, his or her heirs, successors, dependents or assignees, including without limitation any obligation to provide employment, severance payments or any other benefits, whether for or under any employee benefit plan as defined in Section 3(3) of ERISA maintained by Allied or any affiliate or to which Allied or any affiliate has contributed for or on account of any person employed at the Harewood Mine or otherwise, except as expressly stated in Sections 4.3, 4.4, 4.5, 4.7 and 4.8 of this Agreement.

21. Beginning on or about March 27, 1978, and continuing to the present, Allied provided, pursuant to the

1978 Wage Agreement, at Article XX, and the UMWA 1974 Trust, certain health benefits for pensioners, both regular and disabled, their surviving spouses and dependents, who retired under the UMWA 1974 Pension Plan and whose last classified employment was with Allied at the aforesaid coal mining operations.

22. Ronald J. Russell, manager of Allied's Labor Relations and EEO, wrote to the Fund on February 27, 1980, advising them of the Harewood sale to Armco and stating:

> All employees and beneficiaries of employees who are Allied Chemical's responsibility regarding Health Benefits and Life Insurance coverage will be administered at the Corporation's Morristown, New Jersey Headquarters. A listing of these employees is attached.

23. On March 3, 1980, Allied sent a letter to the subject beneficiaries advising them that, after the sale of its Harewood and Capels operations: "Your health benefits are still the responsibility of Allied Chemical and not that of Armco."

24. Allied routinely added Harewood and Shannon Branch retirees to their insurance group. As recently as April 29, 1982, Allied wrote to Blue Cross/Blue Shield adding J. V. Stewart to its list of retirees. In closing, Loretta G. Gareau of Allied's Pension Services Administration stated: "As per the Labor Agreement in 1978, Allied Corporation (Semet Solvay Division) being the last signatory to a UMWA contract that employed Mr. Stewart, is at present responsible for providing insurance coverage."

25. Allied's June, 1982 monthly statement from Blue Cross/Blue Shield indicated that health benefits for the subject retirees increased from May's premium of $26,781.23 to $42,608.13.

26. By letter dated August 11, 1982, Allied notified its approximately 190 retirees that the Trust fund was re-

sponsible for providing health care coverage following the sale of the mines to Armco and Shannon Pocahontas and that Allied would terminate health coverage for said retirees as of September 1, 1982.

27. Allied continued to provide such health benefits of their own volition until September 29, 1982.

28. On September 29, 1982, plaintiffs filed their complaint in this court, whereupon the Court entered a temporary restraining order against Allied requiring it to continue paying the benefits.

29. Pursuant to the procedure established under the 1978 Wage Agreement, Article XX General Description of the Health and Retirement Benefits (10), and Article IX of the UMWA 1950 Benefit Plan and Trust, as amended on March 27, 1978, for the resolution of disputes under the benefit plans of employers signatory to the 1978 Wage Agreement, plaintiffs, John Ramey and Joseph McCardle, submitted a Request for an Advisory Opinion to the Trustees of the UMWA 1950 Benefit Plan and Trust on August 26, 1982. This request asked whether Allied, Armco, or the 1974 Trust is responsible for providing health and other non-pension benefits coverage to pensioners who last worked at Allied's Harewood mine, or to the spouses, dependents, or surviving spouses or surviving dependents of such pensioners. In October, 1982, plaintiff, Grover C. Robinson, filed a similar Request for Advice with the Trustees of the 1950 Benefit Plan and Trust, asking whether Allied, Shannon Pocahontas, or the 1974 Trust is responsible for providing health and other non-pension benefits coverage to pensioners described in paragraph 12 who last worked at Allied's Shannon Branch mine, or are the spouses, dependents, or surviving spouses or surviving dependents of such pensioners.

30. On November 4, 1982, the Court granted a preliminary injunction against Allied restraining and enjoining Allied, its agents, employees and all persons acting on its

behalf, from refusing or failing to maintain intact the health care coverage of the pensioners under the UMWA 1974 Pension Plan, whose last classified employment was with Allied at its former coal mining operations near Harewood and Capels, West Virginia, and surviving spouses and dependents, as such coverage is specified in the National Bituminous Coal Wage Agreements of 1978 and 1981 and the UMWA 1974 Pension Plan and Trust.

31. A trial on the merits of the case was conducted by the Court on December 16, 1982, and the Court now has before it the pleadings, all the evidence, including the exhibits and depositions, and has had the benefit of argument of counsel for the respective parties.

CONCLUSIONS OF LAW

1. Jurisdiction is conferred upon this Court by Section 301 of the LMRA of 1947, 29 U.S.C. § 185, Section 502 of ERISA, and 29 U.S.C. § 1132.

2. Armco and Shannon Pocahontas are successors to Allied within the meaning of Q&A H-16.

3. Under the terms of the 1974 Trust, as amended in 1978, the 1974 Trust has no obligation to pay benefits to pensioners whose last signatory employer is no longer in the coal business, if there is a successor to the last signatory employer and the successor is still in the coal business.

4. Article I of the 1978 Wage Agreement prohibits a signatory employer from transferring a signatory coal operation to a successor or assign without securing the agreement of the successor or assign to assume the employer's obligations under the Wage Agreement and any subsequent renewals of said Wage Agreement.

5. Allied was required by Article XX(c)(3)(i) of the 1978 Wage Agreement to establish and maintain an employee benefit plan during the term of the 1978 Wage

Agreement to provide health and other non-pension benefits for UMWA 1978 Pension Plan pensioners whose last classified employment was with Allied at its Harewood or Shannon Branch mines and for the spouses and dependents and surviving spouses and surviving dependents of such pensioners.

6. By their respective acquisitions of Harewood and Shannon Branch, Armco and Shannon Pocahontas are successors to Allied within the meaning of Article I of the 1978 Wage Agreement.

7. In conjunction with the transfers of the Harewood and Shannon Branch mines, defendant Allied was required by Article I of the Wage Agreement to secure the agreement of Armco and Shannon Pocahontas to establish and maintain an employee benefits plan for the provision of health and non-pension benefits to UMWA 1974 Pension Plan pensioners who last worked for Allied at the Harewood and Shannon Branch mines and their spouses and dependents and surviving spouses and surviving dependents.

8. Allied breached Article I of the 1978 Wage Agreement by failing to secure the agreements of Armco and Shannon Pocahontas to assume its obligations to provide health care and other non-pension benefits for its 1974 UMWA pensioners, their surviving spouses and dependents.

9. In the administration of its "employee welfare benefit plan" and the observance of the terms of 29 U.S.C. § 1002(1), Allied is subject to the requirements of 29 U.S.C. § 1104(a)(1).

10. Allied violated the requisite "care, skill, prudence and diligence" imposed upon it by ERISA, 29 U.S.C. § 1104(a)(1)(B) in attempting to terminate the retirees' benefits as evidenced by the August 11, 1982 letter. Further, such action to terminate the retirees was a failure on Allied's part to discharge its duty "in accord-

ance with the documents and instruments [1978 Wage Agreement] governing the plan." 29 U.S.C. § 1104 (a) (1) (D).

11. Armco itself was a signatory party to the 1978 Wage Agreement, and the three wholly-owned subsidiaries of the A. T. Massey Co., Inc., which effectuated the transfer of the Capels operations, were likewise signatories to that Agreement. Consequently, although Article I specifically addresses the obligations of the predecessor employer, a potential successor employer who is bound by Article I may hardly claim that it has no obligations itself in this regard. By the express terms of Article I, the 1978 Agreement is binding upon all of its signatories. Armco and Shannon Pocahontas, therefore, were contractually prohibited from assuming Allied's coal operations without assuming these particular obligations. The last sentence of Article I states "[m]anagement will not abridge the rights of the employees as set forth in this Agreement." By disclaiming in their sales agreement the payment of these benefits, Armco and Shannon Pocahontas have breached their obligations and abridged the rights of the retirees under Article I of the Wage Agreement to which they were signatories. Armco and Shannon Pocahontas in acquiring their respective mining operations at Harewood and Caples under the terms of a contract of sale from Allied without assuming the obligations to provide health care and other non-pension benefits for Allied's retired employees violated Article I of the 1978 Wage Agreement, they being charged with full knowledge thereof.

12. Allied is, at the very least, estopped from denying its responsibility for payment of the benefits by continuing to pay the same for some 16 months beyond the expiration of the 1978 Wage Agreement under circumstances that clearly indicated Allied's intention to retain and continue the obligations imposed by the terms of ERISA and Article I of said 1978 Wage Agreement.

For the above-stated reasons, the Court concludes, in the transfer of mining operations from Allied to Armco and Allied to Shannon Pocahontas, Article I of the 1978 Wage Agreement imposed an obligation upon each of the companies to make provision for the continued payment of the benefits here involved. However, the respective agreements fail to provide such provision. Therefore, Allied, being the responsible party at the time of the transfers, has the obligation for the continuance of payments unless and until Section 4.2 of the Settlement Agreement or Section 2.07 of the Agreement of Reorganization are renegotiated and/or reformed so as to place the responsibility on Armco and Shannon Pocahontas. It is not the Court's intention to rescind or to require renegotiation or reformation of the entire Settlement Agreement between Allied and Armco or any provision thereof, or to disturb in any way the settlement of the lawsuit between the two, or to rescind or to require renegotiation or reformation of the entire Agreement of Reorganization between Allied and Shannon Pocahontas, or any provision thereof.

It is further ORDERED that the bond heretofore posted in this action be released fourteen (14) days from the date of this order.

The Clerk is directed to forward certified copies of this Memorandum Opinion to counsel of record herein.

DATED: January 12, 1983

/s/ Dennis R. Knapp
DENNIS R. KNAPP, Judge

A TRUE COPY, Certified this
13th day of January 1983
Ronald D. Lawson, Clerk

By Rowena A. Stiltner
Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON DIVISION

Civil Action No. 82-2455

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY, JOSEPH MCCARDLE, and GROVER C. ROBINSON, on behalf of themselves and others similarly situated,

Plaintiffs,

Vs.

ALLIED CORPORATION, ARMCO, INC., SHANNON POCAHONTAS COAL CO., corporations; and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

JUDGMENT ORDER

In conformity with the Court's Memorandum Opinion of even date herewith, which Memorandum Opinion is hereby ORDERED filed and made a part of the record herein, it is ORDERED that Allied Corporation continue payment of the health benefits in question in this action unless and until Section 4.2 of the Settlement Agreement between Armco, Inc., and Allied Corporation, or Section 2.07 of the Reorganization Agreement between Allied Corporation and Vera is renegotiated and/or reformed so as to place the responsibility on Armco, Inc., and Shannon Pocahontas Coal Co. It is not the Court's intention to rescind or to require renegotiation or reformation of the entire Settlement Agreement between A

lied and Armco, or any provision thereof, or to disturb in any way the settlement of the lawsuit between the two, or to rescind or to require renegotiation or reformation of the entire agreement of Reorganization between Allied and Shannon Pocahontas, or any provision thereof.

It is further ORDERED that the bond heretofore posted in this action be released fourteen (14) days from the date of this order.

It is further ORDERED that this action be retired from the docket of this Court.

The Clerk is directed to mail certified copies of this order and of the Memorandum Opinion to all counsel of record herein.

DATED: January 12, 1983

/s/ Dennis R. Knapp
DENNIS R. KNAPP, Judge

A TRUE COPY, Certified this
13th day of January, 1983
Ronald D. Lawson, Clerk

By Rowena A. Stiltner
Deputy

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 83-1117

DISTRICT 17, DISTRICT 29, LOCAL UNION 7113, and LOCAL UNION 6023, UNITED MINE WORKERS OF AMERICA; and JOHN RAMEY and JOSEPH MCCARDLE on behalf of themselves and others similarly situated,

Appellees,

v.

ALLIED CORPORATION,

Appellant,

and

ARMCO, INC.; SHANNON POCAHONTAS COAL CO., corporations; and the UNITED MINE WORKERS OF AMERICA 1974 BENEFIT PLAN AND TRUST,

Defendants.

Appeal from the United States District Court for the Southern District of West Virginia

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[Filed Feb. 11, 1985]

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ John M. Guacen
JOHN M. GUACEN
Clerk